THE OFFICE OF REGULATORY STAFF

SURREBUTTAL TESTIMONY & EXHIBITS

OF

MATTHEW P. SCHELLINGER II

MARCH 26, 2018

DOCKET NO. 2017-292-WS

Application of Carolina Water Service, Incorporated for Approval of an Increase in Its Rates for Water and Sewer Services

SURREBUTTAL TESTIMONY AND EXHIBITS OF

MATTHEW P. SCHELLINGER II

ON BEHALF OF

THE SOUTH CAROLINA OFFICE OF REGULATORY STAFF

DOCKET NO. 2017-292-WS

IN RE: APPLICATION OF CAROLINA WATER SERVICE, INCORPORATED FOR APPROVAL OF AN INCREASE IN ITS RATES FOR WATER AND SEWER SERVICES

Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS AND OCCUPATION.

A. My name is Matthew P. Schellinger II. My business address is 1401 Main Street, Suite 900, Columbia, South Carolina, 29201. I am employed by the Office of Regulatory Staff ("ORS") in the Utility Rates and Service Division as a Regulatory Analyst.

Q. DID YOU FILE DIRECT TESTIMONY AND EXHIBITS RELATED TO THIS PROCEEDING?

A. Yes. I filed direct testimony and seven (7) exhibits with the Public Service Commission of South Carolina ("Commission") on March 12, 2018.

Q. WHAT IS THE PURPOSE OF YOUR SURREBUTTAL TESTIMONY?

A. The purpose of my surrebuttal testimony is to respond to the rebuttal testimony filed by Carolina Water Service, Inc. ("CWS" or "Company") witnesses Michael Cartin and Robert Hunter on March 19, 2018. Specifically, I will focus on the following areas:

1) CWS's position on certain financial and legal costs associated with the I-20 sewer system;
2) CWS's position on additional engineering costs incurred as a result of a South Carolina Department of Health and Environmental Control ("DHEC") consent order regarding the Friarsgate Waste Water Treatment Facility ("WWTF");
3) CWS's position on the treatment of late fees associated with proposed revenue increases;
4) CWS's proposal to apply a tax multiplier for Contributions in Aid of Construction ("CIAC"); and,
5) Revenue attributed to the 35% federal tax rate recovered from customers after the enactment of the Tax Cuts and Jobs Act.

Q. CWS CONTENDS CERTAIN FINANCIAL AND LITIGATION COSTS ASSOCIATED WITH THE I-20 SEWER SYSTEM SHOULD BE ALLOWABLE FOR RATE MAKING PURPOSES. HOW DO YOU RESPOND?

A. ORS does not agree with CWS's characterization that financial and litigation costs related to the I-20 sewer system are reasonably incurred, prudent, or to the benefit of rate payers. The Company's Application includes a request to amortize these financial and litigation expenses which total $998,606 over 66.67 years. In Audit Request #30, ORS requested the Company provide a detailed breakdown of the financial and litigation costs and to assign specific costs to each legal action. The Company's response is included as Surrebuttal Exhibit MPS-1 and the Company did not directly allocate its financial and

litigation costs to each legal action. CWS identified the following legal actions as the basis for the financial and litigation expense to be amortized:

- Congaree River Keeper ("CRK") vs. Carolina Water Service – U.S. Federal Court
- Town of Lexington v. CWS – condemnation of the I-20 sewer system
- Administrative Law Court ("ALC") – DHEC denial of permit renewal for I-20
- ALC – Town of Lexington's challenge to DHEC order relating to I-20 interconnection
- Carolina Water Service vs. EPA, Town of Lexington – U.S. Federal Court

ORS reviewed the expense invoices provided but was unable to directly assign specific financial and litigation costs to each legal action.

ORS Position related to CRK vs CWS – U.S. Federal Court

It is ORS's position that the financial and litigation costs related to the CRK vs CWS U.S. Federal Court case should not be recovered from CWS ratepayers. The Order issued by the Court (Surrebuttal Exhibit MPS-2) specified that CWS:

1) Violated its effluent limitations twenty-three (23) times since 2009;
2) Received an economic benefit for the I-20 plant between 2009 and 2013 on average of $689,000 per year;
3) Violated its permit for over seventeen (17) years;
4) Failed to undertake any attempt to comply with the permit between 2002 and 2014; and,
5) Will need to undertake costs to correct the problems caused by its failure to fulfill the permit requirements.

Based on this Order, the Company did not operate the I-20 sewer system in accordance with permit requirements and the ratepayers should not be responsible for the costs associated with the Company's efforts to defend its actions in U.S. Federal Court. The Company did not demonstrate in its rebuttal testimony the specific ways the litigation and its outcome benefit its ratepayers.

ORS Position related to Town of Lexington vs. CWS – condemnation of the I-20 sewer system

The condemnation proceeding related to the I-20 sewer system is currently pending and no Court Order has been issued. It is possible the financial and litigation costs may be recovered from the Town of Lexington once the case has concluded. Per S.C. Code Ann. § 28-2-510 (2007) (B)(1) "A landowner who prevails in the trial of a condemnation action, in addition to his compensation for the property, may recover his reasonable litigation expenses…"

Because the outcome of the condemnation is unknown, it would be appropriate for the Company to request the Commission to consider the establishment of a Regulatory Asset in which to defer the financial and litigation costs associated with this legal action for future rate making treatment. Specifically, the National Association of Regulated Utility Commissioners ("NARUC") Uniform System of Accounts ("USOA") specifies "Regulatory assets and liabilities are assets and liabilities that result from rate actions of regulatory agencies." If this approach is adopted, ORS recommends the regulatory asset be limited to financial and litigation expenses for the I-20 condemnation and the regulatory asset not be allowed to accrue carrying costs.

ORS Position related to legal actions at the ALC

ORS is unable to determine the specific financial and legal expenses incurred by CWS related to the two (2) legal actions pending in the ALC. It appears these legal actions were generated by CWS in response to permit and administrative actions taken by DHEC. Both actions may be resolved with a decision related to the Town of Lexington condemnation of the I-20 sewer system. Because the outcome of the condemnation is unknown, it would be appropriate for the Company to request the Commission consider the establishment of a Regulatory Asset in which to defer the financial and litigation costs associated with this legal action for future rate making treatment. If this approach is adopted, ORS recommends the regulatory asset be limited to financial and litigation expenses for these legal actions at the ALC and the regulatory asset not be allowed to accrue carrying costs.

Q. PLEASE EXPLAIN ORS'S RECOMMENDATION TO REMOVE $306,552 FROM GROSS PLANT IN SERVICE RELATED TO COSTS THE COMPANY INCURRED FOR ENGINEERING SERVICES PERFORMED FOR THE FRIARSGATE WWTF.

A. ORS adjustment No. 32D recommended the removal of $306,552 related to six (6) invoices for WK Dickson which CWS recorded as gross plant in service. The ORS recommendation was made for these reasons:

1) The six (6) invoices provided for ORS review lacked sufficient detail to determine the specific work performed by the vendor; and,

2) Based on the project number noted on the vendor invoices, the work performed was related to implementation of two (2) DHEC Consent Orders which state the Company violated the terms of its National Pollutant Discharge Elimination System ("NPDES") Permit issued by DHEC.

Q. PLEASE EXPLAIN THE DEFICIENCIES FOUND ON THE VENDOR INVOICES.

A. The six (6) WK Dickson invoices are attached as Surrebuttal Exhibit MPS-3. All six invoices denote the Project No. as 20170019.00.CA Engineering Services – Carolina Water Services. The brief description offered on each invoice is Phase 01 Friarsgate WWTF Consent Order Support. Based on the invoice format, ORS can verify the project hours, rate for services, and date for services. However, ORS is not able to verify the specific work performed by the vendor in support of the Company beyond compliance with the DHEC Consent Orders. ORS informed the Company of this issue on March 7, 2018, to allow the Company the opportunity to provide additional information to better describe the work performed by the vendor. As of the date of this testimony, no additional information was provided by the Company or reviewed by ORS.

Q. WHY DOES ORS RECOMMEND THE RECOVERY OF THE ENGINEERING COSTS NOT BE INCLUDED FOR RATE MAKING?

A. Since the last rate case, DHEC issued and CWS agreed to two (2) Consent Orders which document CWS violated its NPDES permit at the Company's Friarsgate WWTF. See Surrebuttal Exhibit MPS-4 for a copy of the Consent Orders 16-039-W and 17-060-W. It appears from ORS's review of the six (6) WK Dickson invoices the Company retained a licensed professional engineering firm to perform certain services related to the

Consent Orders. Specifically, DHEC Consent Order 16-039-W, executed December 22, 2016, requires CWS, among other things, to:

1) Within thirty (30) days of the execution date of this Order submit to the Department an updated Operation and Maintenance (O&M) Manual with standard operating procedures (SOPs) and checklists for the operation of all aspects of the WWTF treatment processes and sludge management, to include at a minimum, process control observations, testing schedules, bench sheets, log entries, etc. as prescribed by a S.C. Registered Professional Engineer. The O&M Manual shall be reviewed and approved by the Department. Upon Department approval the updated O&M Manual shall be implemented by CWS;[1]
2) For a period to be determined by the Department, but no later than the term of this order, utilize the services of an independent certified operator, under the direction of a S.C. Registered Professional Engineer, to operate the WWTF;[2] and,
3) Within thirty (30) days of the execution date of the Order, submit a staffing plan to address adequate operations and maintenance at the facility. Once approved by the Department, implement the staffing plan.[3]

Additionally, DHEC Consent Order 17-060-W executed on July 31, 2017 required CWS to, among other things; "…develop and implement the Sewer Overflow Response Program and the WWCS Training Program…"[4]

[1] Consent Order 16-039-W; p. 4 paragraph 1
[2] Consent Order 16-039-W, p.7, paragraph 7
[3] Consent Order 16-039-W, p.7, paragraph 8
[4] Consent Order 17-060-W, pp. 5-9, paragraph 3

CWS has an obligation to operate the water and wastewater systems in compliance with all federal, state and local laws and regulations. It is reasonable then for CWS customers to have an expectation that, in exchange for the rates paid to CWS, the Company will fulfill its obligation to provide safe, reliable and high-quality utility service in compliance with federal, state and local laws and regulations. It is ORS's position that the DHEC Consent Orders demonstrate that CWS did not fulfill its obligation to its customers. Furthermore, the elements incorporated in the Consent Orders as outlined above, indicate that DHEC determined CWS's staff could not provide "adequately operations and maintenance at the facility."

ORS's recommendation to remove the $306,552 from gross plant in service ensures the ratepayers are not impacted by the Company's failure to fulfill its obligation to provide safe, reliable and high-quality service.

Q. DO YOU HAVE ANY OTHER COMMENTS RELATED TO THE ORS ADJUSTMENT TO REMOVE $306,552 IN ENGINEERING COST?

A. Yes. If the WK Dickson invoices relate to day-to-day operations and maintenance type services such as was required by the Consent Order, the Company should record those expenses as Operations and Maintenance. The Company has requested recovery of these invoices as Gross Plant in Service which is incorrect if the services related to day-to-day operations of the plant such as development of an Operations and Maintenance manual and oversight of a certified operator.

Q. WHY DID ORS RECOMMEND AN ADJUSTMENT IN LATE FEE REVENUE?

A. It is ORS's position that an adjustment to late fee revenue to reflect the impact of the Company's proposed rate increase is appropriate. There is a direct correlation between the total revenue billed by a company and the expected late fees to be charged to customers.

In addition, ORS recognized the impact of the proposed rate increase in an adjustment to the Company's uncollectible accounts as noted in ORS adjustment 41 contained in Audit Exhibit ZJP-1. CWS did not object to that adjustment in its rebuttal testimony. ORS's adjustment to late fee revenues is further supported by case law which states "… Absolute precision is not required, so long as adjustments are known and measurable within a degree of reasonable certainty." *Porter v. South Carolina Public Service Com'n* 328 S.C. 222, 493 S.E.2d 92 (1997).

Q. HAS ORS REVIEWED THE COMPANY'S PROPOSAL TO APPLY A TAX MULTIPLIER TO CIAC TO ACCOUNT FOR STATE AND FEDERAL TAXES?

A. Yes. ORS has reviewed the Company's proposal to apply a tax multiplier to CIAC to account for the recent change in tax law. The change in tax law requires any CIAC (including tap fees and plant impact fees) to be taxed at the applicable federal and state rates. The formula proposed by CWS results in an applicable 33.24% increase on any CIAC received from new customers or developers. The tax multiplier will allow the Company to continue to book the full amount of the CIAC as allowed by their current tariff, and directly pay for any tax costs. ORS agrees that this additional tax burden should be borne by the customer responsible for those costs, not the entire customer base.

ORS does not object to the addition of a tax multiplier to the Company's tariff. The proposed modification (a) does not change a rate applicable to any current customer, and

(b) would not generate operating revenue for the Company but only passes through to future customers, developers, or others increases in expenses directly attributable to the extension of service to such future customers, developers, or others.

Q. HAS ORS ANALYZED THE REVENUES COLLECTED BY THE COMPANY ATTRIBUTED TO FEDERAL INCOME TAX?

A. Yes. To incorporate all known effects of the Tax Cuts and Jobs Act, ORS calculated an estimate of the revenue amount billed to CWS customers which can be attributed to the changed in federal income tax rate from 35% to 21%. ORS's estimated tax differential calculation is based on revenue billed to customers by the Company from January 1, 2018, through the effective date of new rates based on S.C. Code Ann. Laws § 58-5-240(C) which is May 10, 2018. The calculation used by ORS is the amount of revenue billed at the current rates which reflect a 35% federal income tax rate less the amount of revenue billed at the current rates using a 21% federal income tax rate.

Surrebuttal Exhibit MPS-5 demonstrates ORS's calculation of $1,267,425 of revenue attributed to the federal income tax change generated through the expected date of the Commission Order. ORS recommends this amount be placed into a regulatory liability and amortized over three (3) years to coincide with the timing related to the proposed amortization schedules for both rate case expenses and unprotected Accumulated Deferred Income Tax ("ADIT"). This amortization of $422,475 is reflected as an adjustment to the Company's operating revenue and is reflected on ORS witness Payne's Surrebuttal Exhibit ZJP-1.

Q. DO ALL THE PROPOSED ADJUSTMENTS RELATED TO THE TAX CUTS AND JOBS ACT ADDRESS THE ISSUES OUTLINED IN ORS'S PETITION FILED IN DOCKET NO. 2017-381-A?

A. Yes. If all the adjustments related to the Tax Cuts and Jobs Act recommended by both ORS and CWS are incorporated, they will fully address the proposal made by ORS in Docket No. 2017-381-A. Due to the estimates and timing of the Commission order in this Docket and Docket No. 2017-381-A, true-up adjustments may be necessary in the Company's next general rate proceeding to account for exact impacts.

Q. DOES THIS CONCLUDE YOUR SURREBUTTAL TESTIMONY?

A. Yes.

AUDIT REQUEST #30

ORS AUDIT DEPARTMENT REQUEST FORM

Carolina Water Service, Inc.

Docket No. 2017-292-WS

Please acknowledge receipt of request by email.

DATE: **March 14, 2018**

TO: **Michael Cartin**

FROM: **Zac Payne**

AUDIT PURPOSE: **I-20 Litigation Costs**

REQUEST THE FOLLOWING ITEMS BE PROVIDED BY: 3/19/2018

REQUEST DESCRIPTION:

Please provide the most recent total of I-20 litigation costs that CWS is seeking amortization of in this docket. Provide the GL and all invoices supporting this total.

Response: Provided hard copies to be picked up when finished reviewing.

Further, identify specifically all legal defense cases for which these costs were incurred, and provide a brief description/background for each. Provide a breakdown showing how much of the total litigation costs are attributable to each case you have identified.

Response: Below is a summary of all legal defense cases for which these costs were incurred with a brief description/background.

1. CRK v. CWS – Action brought in federal court against CWS for injunctive relief to stop the discharge into the Lower Saluda River from the I20 system and alleging violations of the permit.
2. Town of Lexington v. CWS – Town's condemnation proceeding for the I20 system
3. ALC – review of DHEC's denial of our permit renewal for the I20
4. ALC – Town's challenge of the DHEC order relating to the I20 connection
5. CWS v. EPA, Town of Lexington – Federal Court action CWS brought against EPA and Town of Lexington requesting an injunction to compel the Town connect the I20 to the system or declare the Town's contract with Cayce invalid for its interference with the Town's obligations as DMA under the 208 plan

Of the costs that CWS is seeking amortization of in this docket $925,886.54 is associated with cases 1,3,4, and 5 above all regarding I-20 Litigation Fees. This is referencing all costs from August 2017 back to the last rate case and using an approximation of 20% of Willoughy and Hoefer invoices provided after that date.

Roughly 80% of John Hoefer's time was spent working on the condemnation case after receiving the notice of condemnation. In reference to the condemnation proceeding the Company is seeking amortization expense for $72,719.60 of legal fees.

On the attached excel sheet labelled "ORS Audit Request 30" all dollars highlighted in yellow make up costs associated with cases number 1,3,4, and 5 above. Unhighlighted dollars are associated with the condemnation.

Please let me know if you need more detailed information. Thanks.

Thank you,
Zac Payne

**All dollar amounts highlighted in yellow below are not associated with the condemnation. Unhighlighted dollars are for the condemnation proceeding.

Reference	Co	Business Unit	Obj Acct	Amount	G/L Date	Region	Explanation Alpha Name	Explanation -Remark-	Asset ID	Document Number	Batch Number	Do Ty	Sub	Per No	FY	Address Number
0	400	2015142	2906	21,918.65	10/21/2015	SC	WILLOUGHBY & HOEFER, P A			722660	220941	PV	901	10	15	3000723
1	400	2015188	2906	18,465.69	12/16/2015	SC	WILLOUGHBY & HOEFER, P A			735177	225162	PV	901	12	15	3000723
2	400	2015188	2906	150.00	1/12/2016	SC	ELLIOTT & ELLIOTT, PA			741032	227006	PV	901	1	16	3039878
3	400	2015188	2906	2,767.78	1/21/2016	SC	WILLOUGHBY & HOEFER, P A			743718	227683	PV	901	1	16	3000723
4	400	2015188	2906	36,409.50	2/10/2016	SC	WILLOUGHBY & HOEFER, P A			747991	229315	PV	901	2	16	3000723
5	400	2015188	2906	26,810.35	3/2/2016	SC	WILLOUGHBY & HOEFER, P A			752272	230801	PV	901	3	16	3000723
6	400	2015188	2906	1,637.50	3/30/2016	SC	WINSTON & STRAWN			758743	232989	PV	901	3	16	3004874
7	400	2016054	1782	17,415.32	5/10/2016	SC	WINSTON & STRAWN			768768	236482	PV	406	5	16	3004874
8	400	2016054	1782	66,044.94	5/10/2016	SC	WILLOUGHBY & HOEFER, P A			768769	236482	PV	406	5	16	3000723
9	400	2016054	1782	63,568.30	6/5/2016	SC	WILLOUGHBY & HOEFER, P A			775129	238384	PV	406	6	16	3000723
10	400	2016054	1782	65,830.92	6/5/2016	SC	WILLOUGHBY & HOEFER, P A			775130	238384	PV	406	6	16	3000723
11	400	2016054	1782	42,371.68	7/13/2016	SC	WILLOUGHBY & HOEFER, P A			784400	241516	PV	406	7	16	3000723
12	400	2016054	1782	220.00	8/17/2016	SC	TERRENI LAW FIRM			793161	244466	PV	406	8	16	3033726
16	400	2016054	1782	1,324.55	9/13/2016	SC	WINSTON & STRAWN			801042	246629	PV	406	9	16	3004874
13	400	2016054	1782	58,099.69	9/13/2016	SC	WILLOUGHBY & HOEFER, P A			800903	246623	PV	406	9	16	3000723
14	400	2016054	1776	1,480.50	9/13/2016	SC	WILLOUGHBY & HOEFER, P A			800907	246623	PV	406	9	16	3000723
15	400	2016054	1782	31,773.45	9/13/2016	SC	WILLOUGHBY & HOEFER, P A			800913	246623	PV	406	9	16	3000723
17	400	2016054	1782	1,202.10	9/28/2016	SC	REINHART BOERNER VANDUEREN SC			806408	247761	PV	406	9	16	3083107
18	400	2016054	1782	66,374.90	10/12/2016	SC	WILLOUGHBY & HOEFER, P A			809941	248995	PV	406	10	16	3000723
19	400	2016054	1782	1,350.00	11/15/2016	SC	ELLIOTT & ELLIOTT, PA			818122	251779	PV	406	11	16	3039878
20	400	2016054	1782	45,392.84	12/7/2016	SC	WILLOUGHBY & HOEFER, P A			823151	253416	PV	406	12	16	3000723
21	400	2016054	1782	25,763.33	1/17/2017	SC	WILLOUGHBY & HOEFER, P A			832499	256793	PV	406	1	17	3000723
22	400	2016054	1782	10,372.50	1/17/2017	SC	WILLOUGHBY & HOEFER, P A			832518	256793	PV	406	1	17	3000723
23	400	2016054	1782	31,257.98	1/17/2017	SC	WILLOUGHBY & HOEFER, P A			832519	256793	PV	406	1	17	3000723
24	400	2016054	1782	25.00	1/17/2017	SC	ELLIOTT & ELLIOTT, PA			832523	256793	PV	406	1	17	3039878
25	400	2017008	2856	72,718.79	5/1/2017	SC	WILLOUGHBY & HOEFER, P A			860522	268693	PV	801	5	17	3000723
26	400	2017008	2856	23,629.46	5/15/2017	SC	WILLOUGHBY & HOEFER, P A			864858	270080	PV	801	5	17	3000723
27	400	2017008	2856	38,623.50	5/15/2017	SC	WILLOUGHBY & HOEFER, P A			864859	270080	PV	801	5	17	3000723
28	400	2017008	2856	165.00	6/8/2017	SC	TERRENI LAW FIRM			871103	272365	PV	801	6	17	3033726
29	400	2017008	2856	92,246.70	6/28/2017	SC	WILLOUGHBY & HOEFER, P A			875982	274105	PV	801	6	17	3000723
30	400	2017008	2856	21,218.34	7/10/2017	SC	WILLOUGHBY & HOEFER, P A			878539	275127	PV	801	7	17	3000723
31	400	2017008	2856	2,312.00	7/19/2017	SC	FOX ROTHSCHILD LLP.			881903	276113	PV	801	7	17	3085311
32	400	2017008	2856	2,925.00	8/7/2017	SC	WILLOUGHBY & HOEFER, P A	80%	20%	886631	277852	PV	801	8	17	3000723
33	400	2017008	2856	2,250.00	8/7/2017	SC	BOUFFARD, PAUL, E.			886639	277852	PV	801	8	17	3084553
34	400	2017008	2856	3,034.42	10/17/2017	SC	WILLOUGHBY & HOEFER, P A	2,427.54	606.88	906075	284105	PV	801	10	17	3000723
35	400	2017008	2856	2,660.00	11/1/2017	SC	BAKER DONELSON BEARMAN			910141	285294	PV	801	11	17	3061401
36	400	2017008	2856	3,146.08	12/5/2017	SC	HAYNSWORTH SINKLER BOYD, PA			919203	288101	PV	801	12	17	3037176
37	400	2017008	2856	32,861.75	12/18/2017	SC	WILLOUGHBY & HOEFER, P A	26,289.40	6,572.35	922613	289485	PV	801	12	17	3000723
38	400	2017008	2856	12,784.95	2/27/2018	SC	BAKER DONELSON BEARMAN			940472	295523	PV	801	2	18	3061401
39	400	2017008	2856	4,272.20	2/27/2018	SC	HAYNSWORTH SINKLER BOYD, PA			940475	295523	PV	801	2	18	3037176
40	400	2017008	2856	45,730.48	3/6/2018	SC	WILLOUGHBY & HOEFER, P A	36,584.38	9,146.10	942517	296394	PV	801	3	18	3000723
			Total	998,606.14												

Condemnation Related	Not Related to Condemnation	Total
72,719.60	925,886.54	998,606.14

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CONGAREE RIVERKEEPER, INC., Plaintiff, vs. CAROLINA WATER SERVICE, INC., Defendant.	Civil Action Number: 3:15-cv-00194-MBS **ORDER AND OPINION**

On January 14, 2015, Plaintiff Congaree Riverkeeper, Inc. ("Plaintiff") sued Defendant Carolina Water Service, Inc. ("Defendant") for violations of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.* (2012). In Claim I, Plaintiff claims that Defendant violated its National Pollutant Discharge Elimination System ("NDPES") permit by failing to connect its wastewater treatment plant ("WWTP") to the regional system. In Claim III, Plaintiff asserts Defendant violated the effluent limitations allowed under Defendant's NDPES permit. Plaintiff moves for summary judgment on Claims I and III. ECF No. 57. Defendant moves for summary judgment on Claim I. ECF No. 58.[1]

On August 1, 2016, the South Carolina Department of Health and Environmental Control ("DHEC") denied Defendant's permit renewal request. ECF No. 64-1. On September 7, 2016, the court issued a text order requiring each party submit a supplemental brief on the impact of DHEC's decision to deny the permit renewal on the present case. Both parties asserted that DHEC's decision not to renew does not affect the current case. ECF No 64 at 5 (Plaintiff's supplemental brief); ECF No. 65 at 1 (Defendant's supplemental brief).

[1] Plaintiff consented to dismissal of Claim II at the motion to dismiss hearing held on June 18, 2015. *See* ECF No. 21 at 2.

For the reasons set for below, the court grants Plaintiff's motion for summary judgment and denies Defendant's motion for summary judgment. The court finds there is no genuine issue of material fact that Defendant violated the terms of its NDPES permit by failing to connect to the regional system. The court finds there is no genuine issue of material fact that Defendant exceeded its effluent limitations and Defendant cannot demonstrate the affirmative defense of "upset."

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is a § 501(c)(3) not-for-profit organization that works to protect and improve the environmental status and recreational uses of the Congaree, Lower Saluda, and Lower Broad Rivers in South Carolina. ECF No. 1 at ¶ 12. Plaintiff's board, staff, and members live near and regularly visit the Lower Saluda River and intend to visit that river in the future. ECF No. 1 at ¶ 14. Defendant owns and operates wastewater treatment plants ("WWTPs") and other associated facilities as a public utility pursuant to South Carolina Code Annotated §§ 58-3-5(6), 58-3-10(4). ECF No. 58-1 at 5. The Public Service Commission of South Carolina ("PSC") has exclusive jurisdiction to regulate public utilities in South Carolina, including the oversight and approval of any agreement or contract affecting a public utility's ability to provide sewer service to citizens. ECF No. 58-1 at 6 n.6. PSC issued Defendant's WWTPs operating certificates of public convenience and necessity. ECF No. 58-1 at 5.

Central Midlands Counsel of Governments ("CMCOG") is tasked with conducting water quality planning and management for the Midlands region of South Carolina. *See* ECF No. 58-1 at 3-4. The Town of Lexington ("Town") falls within the Midlands region and was chosen as the Designated Management Agency ("DMA") and regional provider of wastewater collection by the CMCOG, in consultation with the governor, pursuant to 33 U.S.C. § 1288(a). ECF No. 58-1

at 4 n.3. DHEC has the overarching responsibility of regulating activities affecting water quality and establishing classifications and standards. DHEC's issues NDPES permits. Any DHEC decision may be appealed to an administrative law court ("ALC"). The ALC decision may then be appealed to the South Carolina Board of Health and Environmental Control ("Board"). Finally, any Board decision may be appealed to a South Carolina circuit court.

In 1979, pursuant to CWA § 208, 33 U.S.C. § 1288, CMCOG drafted *The 208 Water Quality Management Plan for the Central Midlands Region* (the "208 Plan") a waste treatment and water quality plan for the region. The 208 Plan was most recently updated in 2004. In the 208 Plan, CMCOG states a general policy to consolidate smaller facilities into regional systems. ECF No. 58-1 at 4.[2] A 1993 revision of the 208 plan designated a facility owned by the City of Cayce, South Carolina, as the regional treatment facility ("RTF") that would service the Midlands region. ECF No. 58-1 at 5.

Defendant owns and operates a WWTP in Lexington County, South Carolina, known as the I-20 Plant. *Id.* DHEC issued NPDES Permit No. SC0035564 ("the Permit") to Defendant on November 17, 1994, (effective January 1, 1995). ECF No. 57 at 4. The Permit was modified in April 1996 and was due to expire on September 30, 1999. ECF 57-1. The Permit authorizes Defendant to discharge wastewater from the I-20 Plant into the Lower Saluda River subject to effluent limitations and monitoring requirements. Importantly, the Permit provides that "[i]n accordance with the [208 Plan], the [I-20] facility is considered a temporary treatment facility that will be closed out when the regional sewer system is constructed and available." ECF No.

[2] "Small, public or private domestic wastewater treatment facilities are considered temporary facilities. When a regional wastewater collection system, public or private, becomes available, these facilities will be required to connect to that system." 208 Plan at 44.

57-1. Defendant's permit was to expire when the regional system received its permit to operate. *Id.*

On April 7, 1999, Town completed construction on the regional sewer line and received a Permit to Operate from DHEC. ECF No. 58-1 at 6. On April 21, 1999, DHEC informed Defendant and Town that the regional system received its permit to operate and that Defendant's construction permit to connect to the regional system was approved. ECF Nos. 65-4, 65-5. Town and Defendant were unable to agree on the terms of a connection. ECF No. 65 at 2. Defendant never constructed the pipeline to connect to the regional system. *Id.* On July 16, 1999, and August 24, 1999, Defendant sought a major modification to the Permit that would allow the I-20 Plant to continue operating indefinitely as Defendant negotiated with Town and sought PSC approval to connect to the regional system. ECF 61-2 at 24–25. DHEC denied Defendant's major modification requests on the basis that Defendant did not provide good cause for its requests. ECF 61-4 at 2. In February 2000, DHEC found that Defendant was in violation of the Permit due to Defendant's failure to connect to the regional system and for exceeding permitted discharge levels. ECF No. 61-5. In February or March 2000, Defendant appealed denial of the modification, denial of permit reissuance, and issuance of violations to the ALC. *See Carolina Water Service v. S.C. Dept. of Health and Environ. Control*, No. 99-ALJ-07-0450, 2002 WL 385126 (S.C. Admin. L. Judge Div. Feb. 25, 2002) [hereinafter 2002 ALC Decision].

In July 2000, DHEC and Town entered into an agreement that (1) noted Town's regional system had insufficient capacity to handle the wastewater from Defendant's system, (2) noted PSC must approve any agreement between Town and Defendant, and (3) required Town to offer Defendant a contract by August 5, 2000. ECF No. 65 at 3. Town and Defendant came to an agreement and submitted said agreement to PSC (Docket No. 2000-425-S); however, Defendant

withdrew the agreement from consideration in January 2001 pending consideration of Defendant and Town's joint amendment to the 208 Plan. *Id.* The amendment from Defendant and Town proposed that the I-20 Plant be designated as a permanent treatment facility and not be required to connect to the regional facility. *Id.*

On March 22, 2001, CMCOG approved the joint amendment to the 208 Plan. ECF No. 58-1 at 7. However, DHEC refused to certify the amendment. ECF No. 58-1 at 7. In August 2001 Defendant, Town, and CMCOG filed a petition in the ALC protesting DHEC's refusal to certify the proposed amendment. The Lexington County Joint Municipal Water and Sewer Commission intervened. *See CMCOG v. DHEC*, Nos. 01-ALJ-07-0363-CC, 01-ALJ-07-0364-CC, 01-ALJ-07-0365-CC, 01-ALJ-07-0433-CC, 2002 WL 31716469 (S.C. Admin. L. Judge. Div. Oct. 22, 2002).

On February 25, 2002, the ALC issued a decision on Defendant's appeal of DHEC's denial of the modification, denial of permit reissuance, and issuance of violations. The ALC deferred to CMCOG's finding that Defendant was in conformance with the NDPES permit until February 24, 2000, because the regional system was not available for connection. *Carolina Water Service*, 2002 ALC Decision at *4, *6. Further, the ALC modified the permit compliance schedule requiring Defendant connect to the regional system. *Id.* at 9. Essentially, the ALC ordered that Defendant was under an "on-going obligation to negotiate an agreement and to continue to seek an agreement between [Defendant] and [Town] that will be approved by the PSC." *Id.* at 10. The order then states specific timeframes if PSC approves of an agreement. Alternatively, the ALC held that if PSC denies the connection agreement, then the permit will expire after one hundred-eighty days of the final PSC Order. *Id.*

Defendant and DHEC both appealed to the DHEC Board. *Carolina Water Service v. S.C. Dep't of Health and Environ. Control*, No. 99-ALJ-07-0450, ECF No. 16-3 (DHEC Board Order

March 15, 2004) [hereinafter 2004 Board Order]. The DHEC Board reversed the ALC's holding that Defendant's permit would expire one hundred-eighty days after a PSC denial but otherwise affirmed the ALC's amended schedule to connect to the regional system—including Defendant's on-going obligation to negotiate with Town for an acceptable contract. *Id.* at 5.

In 2002, Defendant submitted the 2000 interconnection agreement to PSC for approval, with modifications to the customer rate. PSC refused to approve the interconnection, finding the proposed agreement against the public interest. *In re Application of Carolina Water Service,* No. 2002-147-S, 2003 WL 26623818 at *5 (S.C.P.S.C. 2003). PSC found that Defendant agreed to pay too high a rate for the service received and Defendant's customers, in effect, would subsidize the regional system. *Id.* at 6. PSC denied Defendant and Town's alternative plan, which would sell one of Defendant's other facilities and designate the I-20 Plant as a permanent treatment facility. *Id.*

In August 2009, the City of Cayce, Town, and the Lexington County Joint Municipal Water and Sewer Commission entered into a contract to expand the capacity of the Cayce regional treatment plant. *See* ECF No. 58-3. The construction of the expansion was financed through issuance of tax-exempt bonds with restrictive covenants designed to preserve the bonds' tax-exempt status.[3] ECF No. 58-3 at 38–39. One condition is a restriction on the amount of wastewater from "Private Business Use" that can be treated. *Id.* "Private Business Use" includes a private utility like the I-20 Plant. *Id.*; *see also* ECF No. 58-1 at 9. Town covenanted that it would not enter into any contract or agreement for sale of its wastewater services or allocated capacity that constitutes a "Private Business Use." ECF No. 58-3 at 39. If Town contracted with another party for activity that constituting "Private Business Use," the contract "may cause the

[3] As this was in 2009, Town knew of Defendant's requirement to connect to its regional system.

interest on [b]onds to be included in the gross income of the holders," thereby, extinguishing the bonds' tax-exempt status. *See* ECF No. 58-3 at 38.

Defendant did not engage in negotiations with Town after the denial by PSC in 2003 until 2014, after Plaintiff served its notice of intent to sue under the CWA. *See* ECF No. 58-1 at 8. In July 2012, Defendant again inquired into making the 1-20 Plant into a permanent facility and stated to DHEC that it had not had "any recent discussions with [Town] about hooking up to [the regional] system." ECF No. 57-4.

On November 6, 2013, Plaintiff served on Defendant and DHEC notice of intent to sue under the CWA. ECF No. 58-1 at 10. Plaintiff asserted that Defendant was in violation of NPDES Permit SC0035564 since it has failed to eliminate its discharge into the Saluda River. ECF No. 58-1 at 10.

On March 21, 2014, Defendant initiated negotiations with Town regarding a possible connection to the regional system. No. 58-5. On May 8, 2014, Town responded that it was not interested in an interconnection at the time. ECF No. 7-10.

On July 31, 2014, Defendant and Town entered into a confidentiality agreement to negotiate a sale of the I-20 Plant. ECF No. 58-6. Town was interested in acquisition of the I-20 Plant only if it also acquired another facility owned by Defendant, the Watergate system. ECF No. 58-7. Before engaging in further negotiations Defendant requested a non-binding letter "indicating that a $13.5 Million price is within a reasonable range of value that the Town would be willing to consider paying." *Id.* Town declined to enter into a non-binding letter of agreement, stating it was unable to determine if that price was within a reasonable range without other information. ECF No. 58-7. Defendant provided Town with maps of the system, as requested. ECF No. 58-7. In December 2014, Defendant provided Town with additional information on the

number of customers, yearly revenue, yearly costs, and other data. ECF No. 58-8. Town did not respond to Defendant about the proposed price and did not make an offer for the systems. ECF No. 58-1 at 11.

In July 2015, Defendant submitted a draft permit renewal to DHEC, which sought to add that "[t]o connect to the Town DHEC recognizes that [PSC] must approve an agreement related to connection to the regional sewer line." ECF No. 65-8 at 34. DHEC issued a fact sheet noting that Defendant would need PSC approval and that DHEC does not have the authority to force Defendant and Town make a connection agreement. *Id.* at 41. On August 25, 2015, DHEC held a public hearing to elicit public feedback on Defendant's permit renewal request. ECF No. 65 at 7. Approximately 285 individuals attended the hearing, including numerous public officials. ECF No. 64 at 3. Almost all attendees advocated for denial of the renewal permit. *Id.*; ECF No. 58-18 at 4.

On September 3, 2015, Defendant unilaterally filed an application with PSC seeking approval of an interconnection agreement at the wholesale treatment rate Town charged Defendant for another system. ECF No. 34-1 (PSC Docket No. 2015-327-S). Defendant did not seek Town's approval before submitting the application. ECF No. 58-10 at 2.

On September 4, 2015, DHEC issued a notice of intent to deny the renewal permit. ECF No. 33-1 at 1. DHEC determined Defendant was ineligible for a permit renewal because Defendant's permit required Defendant to connect to the regional system once the system was operational and Defendant failed to do so. ECF No. 33-1 at 1.

On September 9, 2015, Defendant sent Town a letter requesting interconnection on the terms set forth in the September 3, 2015, application. ECF No. 58-9. Town declined any interest in an interconnection agreement as the terms did not accurately reflect current costs. ECF No.

58-10 at 2–3. Town indicated a continued interest in acquisition of the I-20 Plant, but only if Defendant agreed to pay a portion of Town's due diligence. ECF No. 58-1 at 12-13. Defendant responded that it was not interested in such an agreement. ECF No. 58-1 at 12.

On November 10, 2015, South Carolina Office of Regulatory Staff organized a meeting to facilitate negotiations between Defendant and Town. ECF No. 65 at 8. At this meeting, Town's limiting contractual and bond covenants were discussed. *Id.* In January 2016, Defendant's PSC application was dismissed without prejudice. *See* ECF No. 65-8 at 74. Between April 2016 and July 2016, DHEC conducted numerous mediation sessions between Defendant and Town. ECF No. 65 at 9.

On August 1, 2016, DHEC formally denied Defendant's permit renewal request. ECF No. 64-1. As part of DHEC's denial, DHEC required Defendant and Town submit a coordinated plan for Defendant to connect to the regional treatment facility within sixty days. ECF No. 64-2 at 5. If DHEC did not approve that plan, an amended plan must be resubmitted within fifteen days. *Id.* Finally, Defendant's plant must be connected to the regional system and cease discharge within twelve months. *Id.* Defendant appealed denial of permit reissuance to ALC on September 21, 2016. ECF No. 65 at 10.

To date, there has been no interconnection agreement or acquisition agreement for the I-20 Plant and Defendant continues to discharge water into the Saluda River. Defendant is permitted limited discharges into the Saluda River. Defendant has exceeded those discharge limits twenty-three times between 2009 and 2013. ECF No. 1-3.

II. LEGAL STANDARD

The court shall grant summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. The judge

does not weigh evidence but determines if there is a genuine issue for trial. *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986). The party seeking summary judgment bears the initial burden of coming forward and demonstrating an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the nonmoving party must affirmatively demonstrate that there is a genuine issue of material fact for trial. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The court should grant summary judgment if a party fails to "establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

III. ANALYSIS

Plaintiff moves for summary judgment on Claims I and III. Plaintiff argues that there is no genuine issue of material that (1) Plaintiff has standing to sue, (2) Defendant was required to connect to the regional treatment facility under the 1994 Permit, and (3) Defendant violated the effluent limitations requirement on twenty-three occasions. Defendant moves for summary judgment on Claim I. Defendant claims there is no genuine issue of material fact that (1) Plaintiff lacks standing, (2) Plaintiff is barred by the statute of limitations, (3) the 2002 modifications to the permit apply and Defendant is in compliance with the modified terms, or if the 1994 Permit applies, Defendant is in compliance with the 1994 Permit as well. Defendant argues there is a genuine issue of material fact whether it has an "upset defense" to its effluent limitations violations.

A. Claim I: Violation of Connection Requirement

1. Plaintiff Not Barred by Statute of Limitations

Defendant asserts that the alleged violation of failure to connect occurred more than five years prior to the filing of the complaint; therefore, Plaintiff's action is barred by the statute of limitations. At the motion to dismiss stage, the court held that the violation is ongoing, thus not barred by the statute of limitations.

> Defendant also argued that Plaintiff's first cause of action was barred by the five-year statute of limitations contained in 28 U.S.C. § 2462. Plaintiff countered that the alleged violation was a continuing violation. Citizen-plaintiffs show an ongoing violation "either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations. Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition." *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171–72 (4th Cir. 1988). Assuming for the purposes of the motion to dismiss that Defendant's failure to connect its facility to the regional system is a violation of the permit, the Court concluded that the violation as alleged is ongoing because discharge from the facility is alleged to be regularly entering the Lower Saluda River.

ECF No. 21.

The court declines to disturb its prior holding. Plaintiff is not barred by the statute of limitations as the failure to connect is an ongoing violation.

2. Standing

At the motion to dismiss stage, the court stated that Plaintiff had standing and denied Defendant's motion to dismiss without prejudice. Defendant moves for summary judgment that Plaintiff lacks standing. Plaintiff must demonstrate that it has standing to bring the case. Plaintiff asserts associational standing. To demonstrate associational standing, Plaintiff must show "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the

relief requested requires the participation of individual members in the lawsuit." *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 517 (4th Cir. 2003) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

A member has standing to sue in their own right where he or she can establish the three elements of Article III standing: (1) injury, (2) traceability, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff bears the burden of establishing injury, traceability, and redressability. *Id.* at 560–61. Plaintiff asserts that its members have "suffered injuries that are fairly traceable to the discharges from the [I-20 Plant], and a court order would redress these injuries." ECF No. 57 at 9. Defendant argues that Plaintiff fails to demonstrate that the alleged injuries were caused by Defendant rather than third parties not before the court, Town and PSC. Defendant next argues that Plaintiff fails to demonstrate that its injuries would be redressed by a favorable decision, because redressing Plaintiff's alleged injury involves third parties, Town and PSC. ECF No. 58-1 at 31–32. For the reasons set forth below, the court finds that Plaintiff's injuries are traceable to Defendant and can be redressed by this court.

a. Injury

To demonstrate legal "injury," the plaintiff "must have suffered 'an injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (internal citations omitted). In an environmental case, "plaintiffs adequately allege injury when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area [are] lessened'" by the alleged activity. *Friends of the Earth, Inc. v. Laidlaw Environ. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) (stating that plaintiffs who avoid using the portion of the

river due to concerns about discharges from the facility sufficiently allege injury). Mere speculative intentions, such as the intent to visit the area "someday" are insufficient to demonstrate a concrete injury. *See Lujan*, 504 U.S. at 564.

Here, Plaintiff's members specify their use of the river and their attempts to avoid the river in the area of the I-20 Plant discharge pipe. Regan Norris often fishes and kayaks in the Lower Saluda River; however, he tries to avoid kayaking near the discharge pipe and is concerned about eating fish from the river. ECF No. 15-2 at ¶¶ 5–6. Amanda Odum avoids kayaking and canoeing in the Lower Saluda River near the I-20 Plant discharge pipe. ECF No. 15-3 at ¶ 6. Bill Stangler uses the Lower Saluda River but avoids contact with water near the I-20 Plant discharge pipe. ECF No. 15-4 at ¶ 3–4. Hartley Barber owns a tour guide company that provides guided tours of the Lower Saluda, and tells clients to avoid that section of the river when the pipe is discharging wastewater. ECF No. 15-5 at ¶¶ 3–5. Each of the Plaintiff's members also state aesthetic issues with the water's appearance and smell.

Defendant makes a conclusory statement that Plaintiff has not shown sufficient injury. ECF No. 58-1 at 31 n.28. Defendant attempts to cast Plaintiff's cited declarations as lacking personal knowledge and offering legal conclusions. ECF No. 60 at 25. The court disagrees. Plaintiff has demonstrated that its members use the affected area, thus have personal knowledge, and that they avoid the area due to aesthetic and health concerns. Plaintiff has demonstrated injury.

b. Traceability

To demonstrate "traceability," the plaintiff must show "a causal connection between the injury and the conduct complained of [that is] fairly trace[able] to the challenged action of the defendant, and not . . . . th[e] result [of] independent action by some third party." *Id.* In

environmental cases, the plaintiff does not need to "show to a scientific certainty that the defendant's actions caused the precise harm." *S.C. Wildlife Fed'n v. S.C. Dep't of Trans.*, 485 F. Supp. 2d 661, 670 (D.S.C. 2007). A plaintiff "need not show that a particular defendant is the only cause of their injury." *Nat. Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974 (4th Cir. 1992). However, a plaintiff must demonstrate there are not "independent actors not before the court[] and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Lujan*, 504 U.S. at 560.

First, the harm is traceable to Defendant. Defendant is discharging treated wastewater into the Saluda River. While there may be additional businesses discharging into the Saluda River, Plaintiff's members specifically noted the area around Defendant's discharge pipe in their affidavits. *See* affidavits cited *supra* Section III.a.ii.1.This aesthetic injuries are traceable to Defendant. Second, while there is more than one party required to connect the I-20 Plant to the regional system, the harm is still traceable to Defendant. The Permit puts the onus on Defendant to provide a satisfactory agreement for PSC's approval. The prior denials demonstrate what PSC will find acceptable in a proposed agreement. Further, Defendant has the obligation to contract with Town or take other measures to fulfill the Permit requirements. Defendant has kept its plant open for seventeen years after it was required to connect. While regional connection does require other actors' assistance and approval, Defendant cannot be rewarded for its lack of a good faith effort to engage in negotiations and receive the required approvals. The court finds that the independent actors' behavior is sufficiently predictable. The court finds that Plaintiff's injury is traceable to Defendant's actions.

c. Redressability

Lastly, to demonstrate "redressability," the plaintiff must demonstrate that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561. The redressability requirement ensures that the plaintiff would personally benefit in a tangible way from the court's intervention. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir. 2000) (citing *Warth v. Seldin*, 422 U.S. 490, 508 (1975)). A plaintiff must demonstrate standing separately for each form of relief sought. *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (observing that notwithstanding the fact that plaintiff had standing to pursue damages, he lacked standing to pursue injunctive relief); *see also Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("[S]tanding is not dispensed in gross."). Plaintiff seeks an injunction and civil penalties. ECF No. 1 at 16.

i. Injunctive Relief

A plaintiff seeking injunctive relief demonstrates redressability by alleging a "continuing violation or the imminence of a future violation" of the statute at issue. *Friends of the Earth, Inc.*, 204 F.3d at 162 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108 (1998)). However, if the redress requires action by a third party, it does not fulfill Article III redressability. *Lujan*, 504 U.S. at 569. For example, in *Lujan*, the requested relief required consultation between the defendant and third party agencies that were not before the court. *Id.* As an example, the Court of Appeals for the Fourth Circuit in *Friends for Ferrell Parkway* found that the Fish and Wildlife Service ("FWS") was not the proper defendant because (1) a private third party contracted to sell the land to FWS, (2) the alleged injuries were not due to FWS's intent to create a sanctuary, and (3) a third party city would have to develop the land. *Friends for Ferrell Parkway, LLC v. Stasko et. al*, 282 F.3d 315, 324 (4th Cir. 2002). Therefore, any relief

granted against defendant FWS would have no impact on the plaintiff's alleged injuries. *Id.*; *see Frank Krasner Enter. Ltd. v. Montgomery Cty.*, 401 F.3d 230 (4th Cir 2005) (finding that third party was not before the court and court could not compel third party to rent space or subsidize plaintiff).

Plaintiff asserts that, as to Claim I, redressability is shown by alleging a continued or imminent violation. ECF No. 57 at 11; *see also Gaston Copper*, 204 F.3d at 154. Defendant argues that an injunction by this court for a sale, connection agreement, eminent domain action, condemnation, or closure of the facility is too speculative or dependent upon third parties to suffice the redressability requirement of standing. Defendant asserts that any agreement for connection requires a contract with Town and PSC approval. Lastly, Defendant asserts that as Town and PSC are not before the court, the court cannot order Town to condemn the property. The court disagrees with Defendant. In *Ferrell Parkway*, there were numerous other actors who needed to take action counter to their stated plans, *i.e.*, the city's sale of the land demonstrated that it did not intend to develop the land. Here, the parties are in negotiations for the connection of the I-20 Plant to the regional system. The court need not compel the parties to take action counter to their stated plans. The court may issue an injunction dictating a specific time to connect to the regional plant that provides sufficient time for Defendant to contract with Town and seek PSC approval. Relief for Plaintiff is not too speculative or dependent upon third parties.

ii. Civil Penalties

Plaintiff alternatively requests civil penalties, *i.e.*, monetary relief. "All civil penalties have some deterrent effect." *Hudson v. United States*, 522 U.S. 93, 102 (1997). Civil penalties under the [CWA] do more than incentivize immediate compliance, they also deter future violations. *Laidlaw*, 528 U.S. at 186. Defendant argues standing for civil penalties for Claim I

suffers the same defect as standing for an injunction. Should the court impose a civil penalty on CWS for not connecting and ceasing discharges, Defendant's compliance to avoid future penalties would still be subject to an agreement with various third parties not bound by an order of the court. Defendant has continued to engage in profitable activity, in violation of its permit, for seventeen years. The court finds that an imposition of civil penalties is not inequitable. Such penalties would be an incentive for Defendant to engage in further negotiations with Town. Accordingly, civil penalties would redress Plaintiff's injuries.

The court finds that element "(a)" of standing is met, Plaintiff has demonstrated injury, traceability, and redressability. As to element "(b)," Plaintiff's purpose is "protecting the natural environment and public health." ECF No. 57 at 12. As this matter involves water pollution, it is germane to the association's purpose. As to element "(c)," individual participation is not required as the relief sought is compliance with the NDPES permit, not private damages or injunctions tailored for the individual plaintiff. *Id.* at 12–13. The court finds that Plaintiff meets elements (b) and (c). Plaintiff has organizational standing.

3. *Buford* Abstention

In a footnote, Defendant argues the *Burford* abstention doctrine applies. ECF No. 58-1 at 30 n.27.[4] *See Palumbo v. Waste Tech. Indus.*, 989 F.2d 156, 160 (4th Cir. 1993) (abstaining where Attorney General should have raised issue on direct appeal or to the Clean Air Act regulatory bodies). *Burford* abstention permits a federal court to dismiss a case only if it presents "difficult questions of state law bearing on policy problems of substantial public import whose

[4] Defendant is cautioned from making arguments in footnotes, while it saves space, arguments contained within footnotes are generally considered with less force and make briefings difficult to read.

importance transcends the result in the case then at bar" or if it "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976); *see Ohio Valley Envtl. Coal. Inc. v. Maple Coal Co.*, 808 F. Supp. 2d 868 (S.D.W. Va. 2011) (holding that *Burford* does not apply as the issue was whether the West Virginia agency complied with CWA permit modification requirements). Here, similar to *Ohio Valley*, Plaintiff is asserting that DHEC did not comply with CWA permit requirements and accordingly is asserting that Defendant is not complying with the validly issued 1995 Permit. The case does not bear on difficult questions of state law, instead it bears directly on implementation of federal law. Nor is the case disruptive of state efforts to establish a coherent policy regarding NDPES permitting systems. *Burford* abstention does not apply.

4. Violation of the CWA

The CWA is a strict liability statute. The court must determine which permit applies, the terms of the applicable permit, and whether Defendant violated those terms.

a. 2002 Modifications

The first issue is whether the Defendant may assert that the terms stated in the 2002 ALC Decision govern whether there was a violation. Plaintiff argues that Defendant cannot argue the 2002 ALC Decision modified Defendant's requirements because Defendant has "consistently and repeatedly admitted in prior filings to this Court that the 1995 Permit is *the* operable permit, and that its language controls liability." ECF No. 59 at 4 (emphasis in original). Plaintiff asserts that under the "law of the case" doctrine, Defendant is prohibited from modifying its argument. ECF No. 59 at 5. Defendant argues that the court's "jurisdiction to entertain citizen suits for alleged violations of NDPES Permits only extends to the terms of the permit which is 'in effect'

at the time that the citizen suit is brought," and the 2002 modifications were the terms in effect. ECF No. 61 at 5. Defendant further argues that Plaintiff misstates the "law of the case" doctrine, and that it is inapplicable to factual allegations. ECF No. 61 at 6.

"Law of the case" doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999) (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988). The court has not made a determination of whether the 1995 Permit or 2002 modifications apply. "Law of the case" doctrine is inapplicable.

However, the rule of judicial admission may apply. Under the rule of judicial admission, "a party is bound by the admissions of his pleadings." *Lucas v. Burnley*, 879 F.2d 1240, 1242 (4th Cir. 1989). A judicial admission is a "representation that is 'conclusive in the case'" such as "formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them." *Minter v. Wells Fargo Bank, N.A.*, 762 F.3d 339, 347 (4th Cir. 2014) (citing *Meyer v. Berkshire Life Ins. Co.*, 372 F.3d 261, 264 (4th Cir. 2004). In *Lucas* the Fourth Circuit Court of Appeals found that there was a binding judicial admission where the issue was raised in the complaint and admitted in the answer. *Id.*; *see also Brown v. Sikora & Assocs., Inc.*, No. 04-0579, 2007 WL 1068241, at *4 (D.S.C. Mar. 30, 2007) (finding that admission in amended answer and cross-claim was binding on the party), *aff'd* 311 F. App'x 568 (4th Cir. 2008). However, a judicial admission is only binding if the statement is "deliberate, clear, and unambiguous." *Everett v. Pitt. Cty. Bd. of Educ.*, 788 F.3d 132, 141 (4th Cir. 2015); *see Fraternal Order of Police Lodge No. 89 v. Prince George's Cty.*, 608 F.3d 183, 189–90 (4th Cir. 2010) (finding that party did not make judicial admission where party could have only

preserved its objection "by continuing to argue with the court after it has already forcefully rejected" the position).

Plaintiff asserts that the below referenced language demonstrates Defendant's admission that the 1995 Permit applies to this matter:

> The Answer filed by CWS admits that the 1995 Permit is the relevant document in this case, stating that its "discharge is authorized pursuant to" the discharge permit issued by DHEC "November 17, 1994 ('NPDES Permit SC0035564')," with a copy of the 1995 Permit "attached hereto and incorporated herein by reference as Answer Exhibit 'A.'" Dkt. 8 (Answer) at ¶ 2. *The 1995 Permit referenced in and attached as Exhibit A to the Answer is identical to the Permit referenced in and attached to the Complaint.*
>
> . . . . The Answer goes on to repeatedly reference the language of the attached 1995 Permit as controlling. *See, e.g., id.* at ¶ 39 ("Defendant *admits . . . that NDPES Permit No. SC0035564 requires that the I-20 WWPT be closed out . . . .*"); *id.* ("Defendant affirmatively asserts that *NPDES Permit SC0035564 on its face*" recognizes the I-20 Plant as regional facility); *id.* at ¶ 52 ("Defendant craves *reference to NPDES Permit SC0035564 for its content* and denies any allegation [] inconsistent *with the language of same*.") (emphases added). The only version of NPDES Permit SC0035564 referenced in, discussed in, and attached to the Answer is the 1995 Permit.

ECF No. 59 at 6–7 (emphases in original).

Plaintiff further points out that in Defendant's motion to dismiss, Defendant stated that "[t]he I-20 WWTP is authorized to operate and discharge wastewater into the Lower Saluda River pursuant to a discharge permit issued by [DHEC] in accordance with [NDPES] under the [CWA] and provisions of South Carolina law. *See* Exh. A, 'NDPES Permit SC0035564,' issued Nov. 17, 1994." ECF No. 7-2 at 3. Defendant argues that Plaintiff fails to point to a "deliberate, clear, and unambiguous statement that [Defendant] intended to waive the application of the modified terms of the schedule of compliance." ECF No. 61 at 7. Additionally, Defendant focuses on the requirement that the court apply the permit "which [is] 'in effect' at the time the citizen suit is brought." ECF No. 61 at 5.

In discussing whether an injunction may be granted where there are "wholly past" violations, the Supreme Court in *Gwlatney of Smithfield Ltd. v. Chesapeake Bay Foundation, Inc.*, held that "[a] citizen suit may be brought only for violation of a permit limitation 'which is in effect' under the act." 484 U.S. 49, 59 (1987) (citing 33 U.S.C. § 505(f)). Defendant interprets this to mean that the court must apply the permit in place at the time the complaint was filed. The court disagrees with Defendant's interpretation. The court finds that the *Gwlatney* court was merely stating that the violations of the permit cannot be wholly in the past, *i.e.*, there must be a chance of violations in the future. *Id.* at 59. The Court did not address which permit out of two or more options would apply.

The court finds that judicial admission does not apply. Defendant did not explicitly state that the 1995 Permit is the only applicable permit, Defendant merely responded (and denied) the complaint's allegations based on the 1995 Permit, there does not appear to be a clear and unambiguous waiver.

b. Modification Procedures

Plaintiff next argues that the 2002 modifications cannot apply because the modifications fail to follow the proper procedure under the CWA. ECF No. 59 at 9. Federal and state regulations govern the modification of NDPES permits.[5] *See Citizens for a Better Env't-CA v. Union Oil Co. of CA*, 83 F.3d 1111, 1120 (9th Cir. 1996). The applicable regulations require (1) a draft permit, (2) accompanying fact sheet setting forth the factual, legal, and policy questions considered while drafting the permit, (3) public notice and comment period, and (4) the opportunity to request a public hearing. *See* 40 C.F.R. §§ 122.62, 124.5–124.12; S.C. Code Regs.

[5] Requests for modifications of NDPES permits follow the same procedures as requests for new permits. 40 C.F.R. §§ 123.25(a)(22) & (a)(25).

§§ 61-9-125.5 to 125.13. "These regulations, both procedural and substantive, ensure that the standard embodied in an NDPES permit cannot be evaded with the cooperation of compliant state regulatory authorities. For instance, there are public notice requirements for a permit modification process . . . ." *Citizens for a Better Env't-CA*, 83 F.3d at 1120. Under 40 C.F.R. § 124.6(e)

> [a]ll draft permits prepared by EPA under this section shall be accompanied by a statement of basis or fact sheet, and shall be based on the administrative record, publicly noticed, and made available for public comment. The Regional Administrator shall give notice of opportunity for a public hearing, issue a final decision, and respond to comments.

(internal citations omitted). In *United States v. Smithfield Foods Inc.*, the Fourth Circuit Court of Appeals affirmed the district court's finding of improper modification because "[the defendant] did not follow the procedures required for the modification of a permit, and none of the Board's Special Orders and letters were issued in accordance with the permit modification procedures." 191 F.3d 516, 524 (4th Cir. 1999) (quoting *United States v. Smithfield Foods Inc.*, 965 F. Supp. 769, 787–88 (E.D. Va. 1997)); *see also Waterkeeper Alliance, Inc. v. U.S. Envtl. Prot. Agency*, 399 F.3d 486, 503 (2d Cir. 2005); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1013 (3d Cir. 1988); *Citizens for a Better-Env't-CA*, 83 F.3d at 1120. If a permit modification fails to comply with the modification procedures, especially public participation, the lawsuit will proceed on the terms of the original permit. *Riverkeeper, Inc. v. Mirant Lovett LLC*, 675 F. Supp. 2d 337, 346 (S.D.N.Y. 2009).

Defendant argues that it followed proper state procedures and Plaintiff's argument amounts to an improper collateral attack on state administrative procedures. ECF No. 61 at 8. Defendant attempts to distinguish *Smithfield Foods* and *Citizens for a Better Environment* by asserting that neither defendant had sought a modification order, the terms were changed after

violations by either the applicable water board or a court. The court finds Defendant's attempt to distinguish unsuccessful. In both *Smithfield Foods* and *Citizens for a Better Environment* state administrative action failed to comply with federal and state procedures, which is the same as the present case. The pertinent issue is whether the modification procedures were followed in full, which was not done in this case.

Finally, Defendant asserts that because its modification request was initially denied, it no longer has to comport with the modification requirements of 40 C.F.R. § 124.5: "Denials of requests for modification, revocation and reissuance or termination are not subject to public notice, comment, or hearings." *See* 40 C.F.R. § 124.5(b). This is inapposite. The regulation merely states that if the permit modification is denied, the issuing body does not need to hold a public hearing. If the permit is going to be denied, it does not change the status quo and public input in unnecessary. However, if there is a modification to the permit, there must be a public hearing (if sufficient public interest). Accordingly, the proper procedure would have Defendant appeal the denial to modify to the Board, the Board overrule the denial and then submit the request to a public notice and comment period. The court finds proper modification procedures were not followed; therefore, the 1995 Permit applies.[6]

c. Violation of 1995 Permit

i. Interpretation of 1995 NDPES Permit

To interpret a provision of an NDPES permit, the court uses the same manner of interpretation as it would interpreting contracts or other legal documents. *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carrol Cty.*, 268 F.3d 255, 269 (4th Cir. 2001). If "'the language is plain and

[6] As the 1995 Permit applies, the court declines to consider whether the 2002 modifications violated the CWA's anti-backsliding rule.

capable of legal construction, the language alone must determine' the permit's meaning." *Id.* at 270 (citing *FDIC v. Prince George Corp.*, 58 F.3d 1041, 1046 (4th Cir. 1995)). "[E]xtrinsic evidence may only be considered if the contract is ambiguous." *Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 751 S.E.2d 256, 261 (S.C. 2013). Lastly, an NDPES permit must be interpreted to give full meaning and effect to all of its provisions and avoid focusing on a few isolated provisions. *Nat'l Res. Def. Counsel v. Cty. of Los Angeles*, 725 F.3d 1194, 1206 (9th Cir. 2013). However, if the terms of the permit are "ambiguous," the court "must look to extrinsic evidence to determine the correct understanding of the permit." *Id.* at 270 (citing *Northwest Environ. Advocates v. City of Portland*, 56 F.3d 979, 983 (9th Cir. 1995)). A term in a permit is ambiguous "if reasonable people could find its terms susceptible to more than one interpretation." *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir 1999). "[A]n interpretation which gives reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." Restatement (Second) of Contracts § 203(a) (1981). It is a question of law whether the language of a contract is ambiguous. *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 550 S.E.2d 299, 302–03 (S.C. 2001).

The language at issue in paragraph 3(c) of the NDPES permit states:

> Within 90 days after the issuance date of the Permit to Operate for the regional sewer system, the Permittee will connect to the regional sewer system and cease the discharge to the Saluda River. This permit will expire on the date of issuance of the Permit to Operate the connection between this facility and the regional sewer system. In accordance with the Area Wide 208 Management Plan, this facility is considered a temporary treatment facility that will be closed out when the regional sewer system is constructed and available.

NPDES Permit No. SC0035564, ECF No. 57-1 at 8.

The terms in question are "connect" and "available." The court finds that both "connect" and "available" are ambiguous terms with reasonable interpretations by both parties. Therefore, the court will look to extrinsic evidence to determine the meaning of the terms. Additionally, the court considers the permit in regard to the CWA's purpose, which is to eliminate discharges from the nation's waterways. 33 U.S.C. § 1251.

(1) Connect

Plaintiff argues that the term "connect" "does not specify any required means of connection – *e.g.*, through an interconnection agreement with the Town of Lexington; a sale of the I-20 Plant to the Town of Lexington; or other means, such as hostile or friendly condemnation." ECF No. 57 at 5. Plaintiff states the Permit's requirements are to "[1] connect to the regional sewer system and [2] cease discharge to the Saluda River" "[w]ithin 90 days after the issuance of the Permit to Operate for the regional system." ECF No. 57 at 13. Plaintiff asserts that the Permit provides no caveats such as "if feasible" or "when an interconnection agreement is approved by [PSC]." ECF No. 57 at 15. Plaintiff argues that the term "interconnection" as used by Defendant is too narrow of a reading as it only "denotes a bulk-services agreement whereby . . . [Defendant] would retain ownership and profits from the [Defendant's] system."

Defendant argues that the Permit requires physical connection, *i.e.*, an interconnection, pointing to the requirements: "[Defendant] shall be responsible for submission of plans and specifications for the connection to the regional sewer system[,]" and "[Defendant] will connect to the regional sewer system and cease the discharge into the Saluda River." ECF No. 58-1 at 26. Defendant further points to the 208 Plan, which states as a general rule "[w]hen a regional wastewater collection system, public or private, becomes available, these facilities will be

required to **connect** to that system." ECF No. 58-1 (citing ECF No. 7-6 at 44) (emphasis in original).

Looking at the entirety of paragraph 3(c), Plaintiff asserts that the sentence cited by Defendant are "merely explanatory phrases that do not modify the connection requirement." ECF No. 62 at 4. The court finds Plaintiff's arguments accurately reflect the terms of the NDPES Permit. Paragraphs 3(a) and 3(b) place the onus on Defendant to seek connection—Defendant is required to submit plans for connection and begin construction of the connection. Further, in 1998, Defendant appeared to understand that the onus was on Defendant to connect, as demonstrated by Defendant seeking and receiving a construction permit in 1998 to connect the I-20 Plant. ECF No. 65-5. Defendant sought the construction permit even though there was no connection agreement in place. *See id.* Defendant's current argument conflicts with the 208 Plan. The 208 Plan clearly states that temporary facilities, such as Defendant, must "consolidate" with a regional system. DHEC has repeatedly required Defendant to connect to the regional system and cease discharging. There are numerous ways to connect to the facility. The court finds "connect" does not mean on Defendant's terms, nor does it infer that Defendant will have a continuing role after connection is made.

(2) Available

Plaintiff understands the term "available" to mean physically available. Defendant understands the terms to mean contractually available. In 2000, DHEC charged Defendant with violating the terms of the permit, namely failure to connect to the regional system when it became physically available. *Carolina Water Service*, 2002 ALC Decision at *1. The ALC Court held that the system was not available to Defendant, deferring to CMCOG's determination that Defendant was in compliance with the NDPES permit. *Id.* at 6. However, the court also found

that Defendant should have submitted whatever contract it could negotiate to have "at least attempted to reach an acceptable and timely agreement." *Id.* at 7. Additionally, the ALC court held that if PSC did not approve of the agreement, Defendant's permit would expire after 180 days. *Id.* at 10. The Board modified the 2002 ALC Decision by instituting a new compliance schedule that merely required Defendant engage in "ongoing negotiations."

DHEC recently revoked Defendant's NDPES permit. ECF No. 64-1 at 1. DHEC explained that Defendant has a "permit which requires connection to a regional sewer system . . . under the water quality management plan under section 208 of the CWA [Defendant] is ineligible for reissuance of a permit once notified by the Department that a regional sewer system is operational." ECF No. 64-1 at 3. DHEC equates the term "available" with "operational," meaning that the regional treatment is operating and physically available for connection. The "permit author[']s]" interpretation is significant when determining ambiguous permit terms. *See Northwest Envt'l Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995). The court finds that the term "available" means physically available.

In conclusion, the court finds that Defendant was required to physically connect to the regional system, in any manner possible, when it became physically available in 1999.

ii. Strict Liability

The CWA is a strict liability statute. ECF No. 57 at 20; *see Piney Run*, 268 F.3d at 265. Accordingly, the "reasonableness or bona fides of an alleged violator's efforts to comply with its permit is not relevant in determining whether a violator is liable under the [CWA]." *Friends of the Earth Inc. v. Laidlaw Environmental Servs.*, 890 F. Supp. 470, 496 (D.S.C. 1995).

> In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to

> comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. § 1319(d). Generally, a fine must be imposed; however, the district court has discretion in the amount fined. *Stoddard v. Western Carolina Regional Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir. 1986). The court may take into account whether "levying [] statutory penalties would merely diminish the resources available to correct the problems caused by the discharge." *Id.* The court first considers the seriousness of the violation. The court finds that the sewage discharge is a serious violation. Next, the court calculated the economic benefit Defendant made on the I-20 Plant between 2009 and 2013, which averaged $689,000 per year. *See* ECF No. 58-8 at 8-11. Third, Defendant has violated its permit for over seventeen years; however, only recently have any person or group undertaken an enforcement action. The last enforcement action ended in 2002. In 1998, Defendant initially attempted to comply with the permit; however, Defendant failed to undertake any attempt to comply with the permit between 2002 and 2014. Lastly, Defendant will need to undertake costs to correct the problems caused by its failure to fulfill the permit requirements. Taking the above into consideration, the court orders a fine in the amount of $1,500,000.

B. <u>Claim III: Violation of Effluent Limitations</u>

Plaintiff moves for summary judgment on Claim III. The court finds that there is no genuine issue of material fact that Defendant violated its effluent limitations twenty-three times since 2009.[7] However, Defendant argues there is a genuine issue of material fact whether Defendant qualifies for an "upset defense." An upset defense is an affirmative defense for

[7] Defendant exceeded its effluent limitations February 2009 (1), April 2009 (1), June 2009 (1), April 2010 (2), September 2010 (1), April 2011 (3), September 2011 (1), February 2012 (1), April 2012 (1), August 2012 (1), January 2013 (1), February 2013 (1), April 2013 (3), May 2013 (1), July 2013 (1), August 2013 (1), February 2014 (1), January 2015 (1), October 2015 (1), and November 2015 (1). ECF Nos. 1-3; 57-8 at 6; 57 at 22.

liability for noncompliance with an NDPES permit requirement. Defendant has the burden of proof to show:

> [A]n exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operation.

40 C.F.R. § 122.41(n)(1); S.C. Code Ann. Regs. 61-9.122.41(n)(1). To claim a defense of upset, the Defendant must show compliance with the oral notice or written submission requirements. S.C. Code Ann. Regs 61-9.122.41(n). South Carolina requires oral notice to DHEC within twenty-four hours and a detailed written submission within five days. S.C. Code Ann. Regs. 61-9.122.41(*l*)(6)(i). Specifically, the Defendant must demonstrate:

> Through properly signed contemporaneous logs, or other relevant evidence that:
> (i) An upset occurred and that the permittee can identify the cause(s) of the upset;
> (ii) The permitted facility was at the time being properly operated; and
> (iii) The permittee submitted notice of the upset as required in paragraph (*l*)(6)(ii)(B) of this section (24 hour notice).
> (iv) The permittee complied with any remedial measures required under paragraph (d) [(duty to mitigate harm)] of this section.

S.C. Code Ann. Regs. 61-9.122.41(n)(3). The notice submitted to DHEC shall include (1) description of noncompliance and its cause, (2) period of noncompliance, including exact dates and times, (3) if noncompliance has not been corrected, the anticipated time it is expected to continue; and (4) steps to reduce, eliminate, and prevent reoccurrence. S.C. Code Ann. Regs. 61-9.122.41(*l*)(6). The written report may be waived by DHEC if an oral report is received within twenty-four hours. *Id.*

Plaintiff argues that Defendant did not follow proper procedures; therefore, cannot assert an upset defense. Defendant stated that its monitoring procedures consist of: (1) third party

testing, (2) if there's an effluent violation the "operator of the I-20 Plant fills out an excursion report noting any known condition that may have contributed to the exceedance," (3) takes steps to correct the exceedance, and (4) reports the exceedances on the monthly reports submitted to DHEC. ECF No. 60-3 at ¶ 6. If the exceedance is ongoing and poses a threat to public health, Defendant will immediately report to DHEC. *Id.* Defendant summarized the exceedance explanations submitted to DHEC in the DMRs. *Id.* Defendant alleged issues with high algae bloom, seasonal turnover, defective "sonic unit," excessive rainfall, extreme winter weather conditions, and maintenance to the sewer main. *Id.* at ¶ 8. Defendant has not shown that it met the requirement to report in twenty-four hours/five days. As Defendant fails to show there is a genuine issue of material fact that it met reporting requirements to claim an upset defense, the court grants Plaintiff's motion for summary judgment on Claim III. As explained above, CWA is a strict liability statute. For each effluent violation, Defendant is fined $1,000, totaling $23,000.

IV. CONCLUSION

Based on the foregoing, Plaintiff's motion for summary judgment **is granted.** Defendant's motion for summary judgment **is denied**. For the reasons stated above, the court fines Defendant $1,500,000 for Defendant's failure to connect to the regional system and $23,000 for Defendant's violation of the effluent limitations, totaling $1,523,000. The fine shall be paid to the United States Treasury. *Gwaltney of Smithfield Ltd.*, 484 U.S. at 53 (finding that "[i]f a citizen prevails in such an action, the court may order injunctive relief and/or impose civil penalties payable to the United States Treasury. [33 U.S.C.] § 1365(a).")

GOOD CAUSE HAVING BEEN SHOWN THEREFORE, IT IS ORDERED that effective April 1, 2018, Defendant Carolina Water Service, Inc. a South Carolina Corporation, its directors, principals, officers, agents, servants, employees, representatives, successors, and

assigns, and all those acting in concert or participation with them shall be, and hereby are, PERMANENTLY ENJOINED and restrained from:

(1) discharging any treated or untreated waste water into the Saluda River; and

(2) must connect to a regional waste water treatment plant, in any manner, in accordance with the 208 Plan.

s/ Margaret B. Seymour
The Honorable Margaret B. Seymour
Senior United States District Court Judge

March 29, 2017
Columbia, South Carolina

Batch 259065

Doc 838567

WK DICKSON
PO Box 36005, Charlotte, NC 28236

INVOICE

Remit to: W.K. Dickson & Co., Inc.
PO Box 36005
Charlotte, NC 28236
(704) 227-3453

Due by 25th of month

David White
Utilities, Inc.
Accounts Payable
2335 Sanders Road
North Brook, IL 60062

January 31, 2017
Project No: 20170019.00.CA
Invoice No: 0082946
PO #237336 BU#400143

Project 20170019.00.CA Engineering Services - Carolina Water Services

Professional Services from January 1, 2017 to January 31, 2017

Phase 01 Friarsgate WWTF Consent Order Support

Professional Personnel

	Hours	Rate	Amount	
Principal	.50	205.00	102.50	
Project Engineer	93.50	130.00	12,155.00	
Civil Designer	38.50	105.00	4,042.50	
Project Administrator	.75	65.00	48.75	
Senior Project Manager	136.50	180.00	24,570.00	
Technical Manager	74.75	156.00	11,661.00	
Totals	344.50		52,579.75	
Total Labor				52,579.75
Reimbursable Expenses				
Auto Mileage			13.38	
Total Reimbursables			**13.38**	13.38
		Phase Amount		**$52,593.13**
		INVOICE TOTAL		**$52,593.13**

Project Manager: Stewart Hill

FEB 0 8 2017

Payments not received within 30 days of due date will be charged interest. THANK YOU FOR YOUR BUSINESS

WK DICKSON
PO Box 36005, Charlotte, NC 28236

INVOICE

30337708

Remit to: W.K. Dickson & Co., Inc.
PO Box 36005
Charlotte, NC 28236
(704) 227-3453

Due by 25th of month

David White
Carolina Water Service, Inc
Accounts Payable
2335 Sanders Road
North Brook, IL 60062

February 28, 2017
Project No: 20170019 00 CA
Invoice No: 0083253
PO No. 240090

Project 20170019.00.CA Engineering Services - Carolina Water Services 400

Professional Services from February 1, 2017 to February 28, 2017

Phase 01 Friarsgate WWTF Consent Order Support

Professional Personnel

	Hours	Rate	Amount	
Principal	1 25	205.00	256.25	
Senior Project Engineer	13.25	148.00	1,961 00	
Project Engineer	113.50	130.00	14,755.00	
Civil Designer	49.00	105.00	5,145.00	
Senior Project Manager	79.50	180.00	14,310 00	
Technical Manager	67.50	156.00	10,530.00	
Totals	324 00		46,957.25	
Total Labor				**46,957.25**

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MAR 14 2016

Reimbursable Expenses

Courier Expense	7.72	
Auto Mileage	223.63	
Total Reimbursables	**231.35**	**231.35**

Phase Amount **$47,188.60**

INVOICE TOTAL **$47,188.60**

Project Manager: Stewart Hill

Batch 263775

Doc 848744

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3033708

Batch 467651

Doc 858008

WK DICKSON
PO Box 36005, Charlotte, NC 28236

INVOICE

Remit to: W.K. Dickson & Co., Inc.
PO Box 36005
Charlotte, NC 28236
(704) 227-3453

Due by 25th of month

David White
Carolina Water Service, Inc.
Accounts Payable
2335 Sanders Road
North Brook, IL 60062

March 31, 2017
Project No: 20170019.00.CA
Invoice No: 0083527
PO # 243304 400

Project 20170019.00.CA Engineering Services - Carolina Water Services
Professional Services from March 1, 2017 to March 31, 2017

Phase 01 Friarsgate WWTF Consent Order Support

Professional Personnel

	Hours	Rate	Amount	
Principal	1.50	205.00	307.50	
Senior Project Engineer	25.00	148.00	3,700.00	
Project Engineer	152.50	130.00	19,825.00	
Civil Designer	34.50	105.00	3,622.50	
Project Administrator	9.00	65.00	585.00	
Senior Project Manager	112.50	180.00	20,250.00	
Technical Manager	69.50	156.00	10,842.00	
Totals	404.50		59,132.00	
Total Labor				**59,132.00**

Reimbursable Expenses

Courier Expense	23.16	
Auto Mileage	517.36	
Total Reimbursables	**540.52**	**540.52**

Phase Amount **$59,672.52**

INVOICE TOTAL **$59,672.52**

Project Manager: Stewart Hill

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APR 19 2017

Payments not received within 30 days of due date will be charged interest.

THANK YOU FOR YOUR BUSINESS

8083708

Batch _____

Doc 866345

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PO Box 36005, Charlotte, NC 28236

INVOICE

Remit to: W.K. Dickson & Co., Inc.
PO Box 36005
Charlotte, NC 28236
(704) 227-3453

Due by 25th of month

David White
Carolina Water Service, Inc.
Accounts Payable
2335 Sanders Road
North Brook, IL 60062

April 30, 2017
Project No: 20170019.00.CA
Invoice No: 0083725
PO # 246210
400

Project 20170019.00.CA Engineering Services - Carolina Water Services
Professional Services from April 1, 2017 to April 30, 2017

Phase 01 Friarsgate WWTF Consent Order Support

Professional Personnel

	Hours	Rate	Amount	
Project Manager	2.00	156.00	312.00	
Senior Project Engineer	26.25	148.00	3,885.00	
Project Engineer	48.00	130.00	6,240.00	
Project Administrator	5.25	65.00	341.25	
Senior Project Manager	43.50	180.00	7,830.00	
Technical Manager	108.25	156.00	16,887.00	
Totals	233.25		35,495.25	
Total Labor				**35,495.25**

Reimbursable Expenses

Courier Expense	7.72	
Engineering Supplies	97.12	
Auto Mileage	11.77	
Total Reimbursables	**116.61**	**116.61**

Phase Amount **$35,611.86**

INVOICE TOTAL **$35,611.86**

Project Manager: Stewart Hill

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MAY 18 2017

Payments not received within 30 days of due date will be charged interest.

THANK YOU FOR YOUR BUSINESS

2033708

Batch 274155

Doc 876512

WK DICKSON
PO Box 36005, Charlotte, NC 28236

INVOICE

Remit to: W.K. Dickson & Co., Inc.
PO Box 36005
Charlotte, NC 28236
(704) 227-3453

Due by 25th of month

David White
Carolina Water Service, Inc.
Accounts Payable
2335 Sanders Road
North Brook, IL 60062

May 31, 2017
Project No: 20170019.00.CA
Invoice No: 0084026
PO #250029 400

Project 20170019.00.CA Engineering Services - Carolina Water Services
Professional Services from May 1, 2017 to May 31, 2017

Phase 01 Friarsgate WWTF Consent Order Support

Professional Personnel

	Hours	Rate	Amount	
Principal	1.00	205.00	205.00	
Project Manager	10.50	156.00	1,638.00	
Senior Project Engineer	57.00	148.00	8,436.00	
Project Engineer	186.25	130.00	24,212.50	
Civil Designer	21.50	105.00	2,257.50	
Technician	11.50	86.00	989.00	
Project Administrator	6.50	65.00	422.50	
Senior Project Manager	154.50	180.00	27,810.00	
Total Labor	101.00	156.00	15,756.00	
	549.75		81,726.50	
Reimbursable Expenses				
Courier Expense			0.00	81,726.50
Regulatory Permit Fees			640.00	
Auto Mileage			245.58	
Total Reimbursables			**885.58**	**885.58**
		Phase Amount		**$82,612.08**
		INVOICE TOTAL		**$82,612.08**

Project Manager: Stewart Hill

RECEIVED
JUN 27 2017

Payments not received within 30 days of due date will be charged interest.

THANK YOU FOR YOUR BUSINESS

3033908

Batch 196052

Doc 881547

WK DICKSON
PO Box 36005, Charlotte, NC 28236

INVOICE

Remit to: W.K. Dickson & Co., Inc.
PO Box 36005
Charlotte, NC 28236
(704) 227-3453

Due by 25th of month

David White
Carolina Water Service, Inc.
Accounts Payable
2335 Sanders Road
North Brook, IL 60062

June 30, 2017
Project No: 20170019.00.CA
Invoice No: 0084280-A
PO # 252034
400

Project 20170019.00.CA Engineering Services - Carolina Water Services
Professional Services from June 1, 2017 to June 30, 2017
Phase 01 Friarsgate WWTF Consent Order Support

Professional Personnel

	Hours	Rate	Amount	
Principal	1.00	205.00	205.00	
Senior Project Engineer	6.50	148.00	962.00	
Project Engineer	29.25	130.00	3,802.50	
Project Administrator	6.25	65.00	406.25	
Senior Project Manager	62.50	180.00	11,250.00	
Technical Manager	54.25	156.00	8,463.00	
Consul Totals	159.75		25,088.75	
Consu Total Labor				25,088.75
tants				
ltant/Struc				
Reim 6/21/2017 K & P Engineering, Inc. STRUCTURAL SUB			630.52	
Total Consultants			630.52	630.52
bursable Expenses				
Courier Expense			7.72	
Regulatory Permit Fees			151.00	
Auto Mileage			2,996.06	
Total Reimbursables			3,154.78	3,154.78

AMOUNT DUE = $28,874.05

RECEIVED
JUL 17 2017

Project Manager: Stewart Hill

Payments not received within 30 days of due date will be charged interest.

THANK YOU FOR YOUR BUSINESS

dhec
Healthy People. Healthy Communities.

December 29, 2016

FIRST CLASS and CERTIFIED MAIL – 9214 8969 0099 9790 1406 9750 05

Carolina Water Service, Inc.
Attn: Bob Gilroy
150 Foster Brothers Drive
West Columbia, S.C. 29172

Re: **Consent Order 16-039-W**
Carolina Water Service, Inc.
NPDES Permit SC0036137
Lexington County

Dear Mr. Gilroy:

Enclosed, please find fully executed Consent Order 16-039-W for the above referenced facility. The Order is considered executed on December 22, 2016.

If you have any questions, please contact Mr. Paul Wise at (803) 898-4181 or by e-mail at paul.wise@dhec.sc.gov.

Sincerely,

Adam Cannon, Manager
Bureau of Water - WP Control Division
WP Enforcement Section

cc: Jaime Teraoka, SCDHEC, WP Compliance Section
SCDHEC, BEHS Region
Michael Montebello, SCDHEC, Water Facilities Permitting
Haynsworth Sinkler Boyd, P.A., Attn: Carlisle Roberts
Carolina Water Service Inc, via Corporation Service Co., 1703 Laurel Street, Columbia SC 29201
Main File

Attachment as stated

S.C. Department of Health and Environmental Control
2600 Bull Street, Columbia, SC 29201 (803) 898-3432 www.scdhec.gov

THE STATE OF SOUTH CAROLINA
BEFORE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

IN RE: CAROLINA WATER SERVICE, INC.
FRIARSGATE SUBDIVISON
LEXINGTON COUNTY

CONSENT ORDER

16-039-W

Carolina Water Service, Inc. (CWS) owns and is responsible for the proper operation and maintenance of the wastewater treatment facility (WWTF) located off of Irmo Drive, serving the residences of Friarsgate Subdivision, in Lexington County, South Carolina.

CWS's effluent limits for fecal coliform (Fecal) as contained in its National Pollutant Discharge Elimination System (NPDES) Permit were exceeded.

Following approved procedures and based upon discussions with representatives for CWS on August 19, 2016, and without admission by CWS of the allegations contained herein, in order to resolve the matter expeditiously, the Parties have agreed to the issuance of this Order.

FINDINGS OF FACT

1. CWS owns and is responsible for the proper operation and maintenance of the WWTF serving the residents of the Friarsgate Subdivision located in Lexington County, South Carolina.

2. The Department issued NPDES Permit SC0036137 (NPDES Permit) to CWS, authorizing the discharge of properly treated wastewater to the Saluda River, in accordance with the effluent limitations, monitoring requirements, and other conditions

set forth therein.

3. Part 1A of the NPDES Permit establishes the following effluent limitations for fecal coliform: The facility is required to monitor and report results for Fecal Coliform weekly. The NPDES Permit limits are two hundred (200) colonies per one hundred (100) milliliters (monthly average) and 400 colonies per one hundred (100) milliliters (daily maximum).

4. Investigations by the Department, including water quality sampling on June 13, 2016, and June 15, 2016, revealed elevated levels of bacteria at the Friarsgate WWTF discharge pipe in the Saluda River and the effluent discharge at the Friarsgate WWTF. Additional water quality samples were collected in the Saluda River and at the Friarsgate WWTF during June 2016.

5. Sample results of the investigation during June 2016 are as follows:

Bacteriological Sample Results at the WWTF and in Saluda River:
(reported in colonies per 100 milliliters)

Date	Parameter	Sample Station		
		Friarsgate 001 at WWTF after all treatment	007 after UV banks	002A Fiarsgate discharge in the Saluda River
6/13/16	Escherichia coli	N/A	>2419.6	866.4
6/20/16	Fecal Coliform	>4839.2	N/A	N/A
6/21/16	Fecal Coliform	1597	N/A	N/A
6/23/16	Fecal Coliform	>24196	<10	N/A
6/24/16	Fecal Coliform	602	10	976.8
6/25/16	Fecal Coliform	471	31	334
6/26/16	Fecal Coliform	987	1	920.8
6/27/16	Fecal Coliform	6488	<1	1376

6/28/16	Fecal Coliform	878	1	332
6/29/16	Fecal Coliform	2098	< 1	N/A
6/30/16	Fecal Coliform	2481	140.1	N/A

6. On August 1, 2016, the Department received the discharge monitoring report (DMR), submitted by CWS for the June 2016 monitoring period, which reported violations of the Fecal limits in the NPDES Permit.

7. On August 19, 2016, Department Staff conducted an enforcement conference to discuss the above findings with Mr. Bob Gilroy, Vice President of Operations, Carl Roberts, Haynsworth Sinkler Boyd, and Jimmy Holland, WK Dickson Engineering, appearing for CWS. The issuance of a Consent Order possibly containing civil penalties was discussed.

8. CWS reported violations of limits for Fecal in the NPDES permit on a DMR submitted to the Department for the July 2016 monitoring period. The DMR was received on August 31, 2016.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the Department reaches the following Conclusions of Law:

1. CWS violated the Pollution Control Act, S.C. Code Ann. § 48-1-110 (d) (Supp. 2015) and Water Pollution Control Permits, 3 S.C. Code Ann. Reg. 61-9.122.41 (a) and (d) (2014), in that it failed to comply with the effluent limits for Fecal contained in its NPDES Permit.

2. The Pollution Control Act, S.C. Code Ann.§ 48-1-330 (Supp. 2015), provides for a civil penalty not to exceed ten thousand dollars ($10,000.00) per day of violation for any

person violating the Act or any rule, regulation, permit, permit condition, final determination, or Order of the Department.

NOW, THEREFORE, IT IS ORDERED, CONSENTED TO AND AGREED, pursuant to the Pollution Control Act, S.C. Code Ann. § 48-1-50 (Supp. 2015) and § 48-1-100 (Supp. 2015), that CWS shall:

1. Within ninety (90) days of the execution date of this Order, submit to the Department three (3) copies of a Corrective Action Plan (CAP), to include a schedule of implementation, reporting the corrective actions that have been taken and any corrective actions planned to adequately address the potential sources contributing to the Fecal violations. The schedule of implementation shall have specific dates or timeframes for the completion of any planned actions and details as to how each action effectuates compliance with the effluent discharge limits of NPDES Permit SC0036137. The schedule for implementation of specific corrective action steps proposed under the CAP shall be evaluated and, upon Department approval, the schedule(s) shall be incorporated into and become an enforceable part of this Order.
2. Within thirty (30) days of the execution date of this Order submit to the Department an updated Operation and Maintenance (O&M) Manual with standard operating procedures (SOPs) and checklists for the operation of all aspects of the WWTF treatment processes and sludge management, to include at a minimum, process control observations, testing schedules, bench sheets, log entries, etc. as prescribed by a S.C. Registered Professional Engineer. The O&M Manual shall be reviewed and approved by the Department. Upon Department approval the updated O&M Manual shall be implemented by CWS.
3. Continue to conduct sampling of the WWTF final effluent for fecal coliform on a daily

basis until notified otherwise in writing by the Department. CWS may request approval from the Department to resume the sampling interval provided in the Permit at any time subsequent to thirty (30) days after the execution date of this Order. Provide the results (laboratory reports) to the Department via email within twenty four (24) hours after CWS' receipt of reports. Notify the Department via telephone within four (4) hours of becoming aware of an exceedance of fecal limits. During normal working hours call (803)-898-4300. After hour reporting should be made to the Department's 24 hour Emergency Response telephone number (803)-253-6488.

4. Modify the Comprehensive Process Control Testing and Evaluation Program to include, at a minimum, the following determinations:

a) Settleometer tests (SSV_5 and SSV_{30})/daily.
b) Sludge blanket depths in individual clarifiers/at least twice per day (a.m./p.m.).
c) Dissolved oxygen profile throughout individual aeration basin/twice per day.
d) Microscopic examination/at least once per week.
e) Mixed Liquor Suspended Solids (MLSS) and Mixed Liquor Volatile Suspended Solids (MLVSS) in individual aeration basins/at least two times per week.
f) Select and utilize at least one of the following most commonly used activated sludge process control techniques:

Control Technique	Frequency	Determination
F:M	3/week	Based on 5 day moving average.
MLVSS	3/week	Volatile solids inventory.
SVI	2/month	
MCRT	3/week	Based on 3-5 day moving ave.
SRT	2/month	

F:M = Food to Microorganism Ratio
MLVSS = Mixed Liquor Volatile Suspended Solids

SVI = Sludge Volume Index
MCRT = Mean Cell Residence Time
SRT = Sludge Retention Time

g) Influent, effluent, return sludge, and waste activated sludge flow rates (gpd or mgd)/daily.

h) Return activated sludge and waste activated sludge concentrations (mg/L) and loading (lbs)/at least three times per week.

i) Influent pH, biochemical oxygen demand (BOD), and total suspended solids (TSS) at the frequency required by the permit, and add ammonia monitoring at frequency of twice per week.

j) Effluent pH, dissolved oxygen, BOD and TSS at the frequency required by the permit, and add ammonia monitoring at frequency of twice per week.

k) Rainfall/daily.

l) Prepare a table of all determinations obtained from a) – k) above for the calendar month with the exception of microscopic examinations [d) above] which should be recorded on separate worksheets detailing relative predominance of organisms.

m) Develop trend charts for those tests or parameters which provide the most useful plant performance information on which to base control decisions.

Prepare a written summary report of interpretations of required process control determinations a) – k) and subsequent process adjustment decisions and/or corrective actions based on these interpretations.

Submit to the Department, on a monthly basis, items l) and m) beginning the month following the execution date of this Order, to be postmarked no later than the 28th day of the month following the reporting period.

5. Within thirty (30) days from the execution date of this Order, submit to the Department a project timeline for CWS to remove and properly dispose of the solids and grit from the

EQ Basin and complete repairs to the EQ Basin liner. Once approved by the Department, implement the removal and disposal project.

6. For a period to be determined by the Department, but no later than the term of this order, begin utilizing the services of an independent laboratory to conduct sampling activities required in the NPDES Permit.

7. For a period to be determined by the Department, but no later than the term of this order, utilize the services of an independent certified operator, under the direction of a S.C. Registered Professional Engineer, to operate the WWTF.

8. Within thirty (30) days of the execution date of this Order, submit a staffing plan to address adequate operations and maintenance at the facility. Once approved by the Department, implement the staffing plan.

9. Within thirty (30) days of the execution date of this Order, provide a report of any chemicals, polymers, or bioremediation enzymes that may have been added (with prior Department approval) including time, date, location and quantity as well as any impact on the treatment plant performance.

10. Within thirty (30) days of the execution date of this Order, submit a recommendation for cleaning and maintenance of the UV system, the bulb replacement schedule, the sleeve cleaning schedule, and recording transmittance. Once approved by the Department, CWS shall implement the UV maintenance schedule.

11. Within ninety (90) days of the execution date of the Order, pay to the Department a civil penalty in the amount of seventy eight thousand nine hundred forty dollars ($78,940.00).

PURSUANT TO THIS ORDER, communications regarding this Order and its requirements, including civil penalty payments, shall be addressed as follows:

Paul F. Wise
Water Pollution Control Division
South Carolina DHEC
2600 Bull Street
Columbia, S.C. 29201

The order number should be included on all checks remitted as payment of the civil penalty.

IT IS FURTHER ORDERED AND AGREED that failure to comply with any provision of this Order shall be grounds for further enforcement action pursuant to the Pollution Control Act, S.C. Code Ann. § 48-1-330 (2015), to include the assessment of additional civil penalties.

IT IS FURTHER ORDERED AND AGREED that CWS does not admit any of the allegations, including Findings of Fact and Conclusions of Law, contained in this Order, but that CWS is entering into this Order in order to expeditiously resolve the issues referenced herein.

IT IS FURTHER ORDERED AND AGREED that CWS may request amendment of this Consent Order, and this Order may be amended as agreed to by the parties.

IT IS FURTHER ORDERED AND AGREED that this Consent Order governs only the civil liability to the Department for civil sanctions arising from the matters set forth herein and constitutes the entire agreement between the Department and Carolina Water Service, Inc. with respect to the resolution and settlement of these civil matters. The parties are not relying upon any representations, promises, understandings or agreements except as expressly set forth within this Order.

[Signature Page Follows]

FOR THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Myra C. Reece
Director of Environmental Affairs

Date: 12/22/16

David G. Baize, Chief
Bureau of Water

Date: 12/22/16

Glenn E. Trofatter, Director
Water Pollution Control Division
Bureau of Water

Date: 12/22/16

Reviewed By:

Attorney
Office of General Counsel

Date: 12/21/16

WE CONSENT:

CAROLINA WATER SERVICE, INC.

Bob Gilroy
Vice President of Operations

Date: 12/21/2016

dhec
Healthy People. Healthy Communities.

August 1, 2017

Certified Mail – 9214 8969 0099 9790 1409 1155 69 and electronic mail

Mr. Bob Gilroy, Vice President
Carolina Water Service, Inc.
150 Foster Brothers Drive
West Columbia, SC 29172

Re: Consent Order 17-060-W
Carolina Water Service, Inc.
Friarsgate Subdivision WWTF
NPDES Permit SC0036137
Lexington County

Dear Mr. Gilroy:

Enclosed, please find a copy of the fully executed Consent Order 17-060-W affecting the above referenced facility. **The Order is considered executed on July 31, 2017.**

Please be aware of the scheduled completion dates outlined on pages five (5) through nine (9) of the Order. Please call me at 803-898-4181 if you have questions or need additional information.

Sincerely,

Paul F. Wise
Water Pollution Enforcement Section
Bureau of Water

W/Enclosure

cc: Adam Cannon - WP Enforcement/Compliance Section
Jeff deBessonet, Water Facilities Permitting
Sonya Johnson - Region 3, Columbia EQC

S.C. Department of Health and Environmental Control
2600 Bull Street, Columbia, SC 29201 (803) 898-3432 www.scdhec.gov

THE STATE OF SOUTH CAROLINA
BEFORE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

IN RE: CAROLINA WATER SERVICE, INC.
FRIARSGATE SUBDIVISION
LEXINGTON COUNTY

CONSENT ORDER

17-060-W

Carolina Water Service, Inc. (CWS) owns and is responsible for the proper operation and maintenance of the wastewater treatment facility (WWTF), located off of Irmo Drive, and the associated wastewater collection system (WWCS), serving the residences of Friarsgate Subdivision, in Lexington County, South Carolina.

CWS discharged untreated wastewater, as result of sanitary sewer overflows (SSOs) from the WWCS into the environment in a manner other than in compliance with a permit issued by the South Carolina Department of Health and Environmental Control (Department). CWS failed to properly operate and maintain the WWCS in accordance with its National Pollutant Discharge Elimination Permit System (NPDES) Permit. CWS verbally reported sewer system overflows (SSOs) to the Department, but failed to submit written reports for the SSOs to the Department in a timely manner.

Based upon discussions with agents for CWS on May 15, 2017, and in the interest of resolving this matter without the delay and expense of litigation, CWS agrees to the entry of this Consent Order, but neither agrees with nor admits to any statements, conclusions, claims or the Findings of Fact or the Conclusions of Law in this Order, but agrees to the requirements stated in this Order.

FINDINGS OF FACT

1. CWS owns and is responsible for the proper operation and maintenance of the WWTF located in Lexington County, South Carolina.

2. The Department issued NPDES Permit SC0036137 (NPDES Permit) to CWS, authorizing the discharge of properly treated wastewater to the Saluda River, in accordance with the effluent limitations, monitoring requirements, and other conditions set forth therein.

3. CWS reported the following SSOs to the Department during 2015 and 2016. The dates, locations, volumes of wastewater released and cause of the SSO are described below. It is also noted that historic rains and flooding in early October 2015 caused issues for numerous facilities in the Midlands and throughout the State.

   a) Between December 22-24, 2015, heavy rains impacted some storm drains and manholes. CWS states that precipitation during this period totaled approximately five (5) inches, according to the WWTF rain gauge.

      - December 22, 2015: Backyard of 101 and 97 Chadford Road 7,400 gallons - heavy rain
      - December 22, 2015: Plant Control Chamber 131 Greenbriar Drive 4,500 gallons - heavy rain
      - December 23, 2015: Manhole Backyard of 101 and 97 Chadford Road 400 gallons - heavy rain
      - December 24, 2015: Manhole Backyard of 101 & 97 Chadford Road 2,000 gallons - heavy rain

   b) February 24, 2016: Manhole 313
      Brickling Road 2,000 gallons –blocked sewer line

4. On March 14, 2017, Department staff visited the WWTF at approximately 11:45 a.m. for the purpose of collecting effluent samples. During the visit, observations were recorded on an Operations and Maintenance (O&M) inspection report. The Department inspector noted on the inspection report a statement by the plant operator, that upon entry the morning of March 14, 2017, he found the WWTF to be overwhelmed by rainfall that occurred the previous day. The Department inspector also noted on the inspection report that the rain gauge at the WWTF measured seventh tenths (0.7) of an inch.

5. On April 5, 2017, CWS reported SSOs occurring at the Friarsgate Wastewater Treatment Facility.

6. On April 6, 2017, Department staff conducted an inspection of the WWTF. CWS representatives were present during the inspection. The Department inspector observed that the influent pump station was inundated with water, the alarm float was pulled due to excessive incoming flow, the EQ basin was overtopping in three (3) areas, and noted that the WWTF's discharge rate could not be determined due to an overflowing Parshall flume. The Department inspector specified on the inspection form that the area had received a total of approximately 4.5 inches of rain during the three (3) consecutive days before the inspection date, and that lime had been applied to the areas impacted by overtopping. The Department inspector noted the overall rating of the inspection as "Unsatisfactory", and took photographs during the inspection.

7. On April 15, 2017, the Department received the written SSO Reports (DHEC Form 3685) for the SSOs that occurred and were orally reported on April 5 and 6, 2017. The cause of the SSOs was reported as heavy flow from rainstorms.

8. On May 15, 2017, Department Staff conducted an enforcement conference to discuss the above findings with Mr. Bob Gilroy, CWS Vice President of Operations, Jeremy

Brashears, WK Dickson Consulting, and Carl Roberts, Haynsworth Sinkler Boyd, present representing CWS. Mr. Gilroy discussed the current plans by CWS to address the Infiltration/Inflow in the Friarsgate Subdivision WWCS. The issuance of a Consent Order, possibly containing civil penalties, was discussed.

9. On May 22, 2017, Department Staff visited the WWTF in response to an odor complaint. During the visit, the Department inspector observed that the influent at the WWTF was temporarily being diverted to the equalization basin. The Department inspector also reported that the rainfall measured at the WWTF from a rainfall event the previous day was one and three quarters (1.75) inches.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the Department reaches the following Conclusions of Law:

1. CWS violated the Pollution Control Act, S.C. Code Ann. § 48-1-90(A)(1) (Supp. 2016), in that it discharged untreated or partially treated wastewater into the environment in a manner other than in compliance with a permit issued by the Department.
2. CWS violated the Pollution Control Act, S.C. Code Ann. § 48-1-110 (d) (Supp. 2016), and the NPDES Permit, in that it failed to report Sewer System Overflows to the Department as required by the Permit.
3. The Pollution Control Act, S.C. Code Ann.§ 48-1-330 (2008), provides for a civil penalty not to exceed ten thousand dollars ($10,000.00) per day of violation for any person violating the Act or any rule, regulation, permit, permit condition, final determination, or Order of the Department.

NOW, THEREFORE, IT IS ORDERED, CONSENTED TO AND AGREED, pursuant to the Pollution Control Act, S.C. Code Ann. § 48-1-50 (Supp. 2016) and § 48-1-100 (Supp. 2016), that CWS shall:

1. Beginning on the effective date of this Order and continuing until the Order is closed, report to the Department wastewater spills from the WWCS as required by law, verbally within twenty-four (24) hours and in writing on the DHEC SSO Report Form, DHEC 3685 (02/2000), within five (5) days.

2. Beginning with the effective date of this Order, submit to the Department copies of public notices issued by CWS for all significant spills, as defined by S.C. Code Ann. § 48-1-95(A)(5) (Supp. 2016), from the WWCS.

3. CWS shall develop and implement the Sewer Overflow Response Program and the WWCS Training Program as set forth below, and ensure that each program has a written, defined purpose; a written, defined goal; is documented in writing with specific detail as required herein; is implemented by trained personnel; has established performance measures; and, has written procedures for periodic review.

    a. Sewer Overflow Response Program. Within ninety (90) days of the effective date of this Order, CWS shall submit a Sewer Overflow Response Plan (SORP) to the Department for review, comment, and approval. Upon Department approval, CWS shall implement the SORP. The SORP shall be a reference for CWS personnel and serve as a guide for responding to, cleaning up, and/or minimizing the impact of SSOs; timely reporting of the pertinent information of SSOs to the appropriate regulatory agencies; and notifications to the potentially impacted public.

(i) The SORP shall provide CWS personnel a series of standard operating procedures with step-wise instructions for how to:

A. Report to SCDHEC the location of SSOs by street address or any other appropriate method (i.e., latitude-longitude) within twenty four (24) hours from the time Defendant becomes aware of the circumstances, in accordance with current laws, regulations and policies, and consistent with CWS's NPDES Permit;

B. Provide written reporting to SCDHEC in accordance with current laws, regulations and policies, and consistent with CWS's NPDES Permit;

C. Maintain records including all written reports to SCDHEC; maintain records documenting steps that have been and will be taken to prevent the SSO from recurring, including work order records associated with investigation and repair activities; and maintain a list of complaints from customers or others with the reported details regarding individual SSOs and their responses that can be used for trend analysis;

D. In accordance with current laws, regulations and policies, and consistent with CWS's NPDES Permit, provide notice to the public of significant SSOs through the local news media or other means, including, as appropriate, signs or barricades to restrict access;

E. Estimate the volume of untreated wastewater released by a SSO, and to minimize the volume released;

F. Take emergency procedures for specific pump stations, install bypass/ pump-around strategies, and other means to prevent the exceedance of a pump station's storage capacity (i.e., maximum volume of sewage that can be stored in the event of a pump station failure or repair without causing a SSO and the time during

which sewage can be stored before a SSO will occur);

G. Determine (i) when additional storage or a pump-around strategy will be needed in the event that a repair may cause or lengthen the time of a SSO; and,

(ii) The SORP shall specify the procedures and frequencies necessary to provide adequate training for CWS's employees, and contractors required to effectively implement the SORP and its standard operating procedures.

b. WWCS Training Program. Within nine (9) months of the effective date of this Consent Order, CWS shall submit to DHEC for review, comment, and approval a WWCS Training Program (Program). CWS shall develop the Program by evaluating the personnel, tasks, equipment, and facilities associated with the operation and maintenance of CWS's WWCS. The Program shall include, and CWS shall implement, upon Department approval:

(i) General Training. CWS shall provide general training to address tasks undertaken by CWS's WWCS personnel. General training would include, for example, employee orientations, training in the basic principles of wastewater collection and transmission, and training in the rules and regulations affecting CWS's WWCS personnel. The general training component of the Program shall provide the content of the initial training, and the frequency and content of the refresher training, to be required for all personnel responsible for management, operations, or maintenance of CWS's WWCS.

(ii). Position Specific Training. CWS shall provide training for tasks undertaken by CWS's WWCS personnel to address the methods, processes, procedures, and techniques required to perform the duties and tasks necessary for the proper operation and maintenance of the collection and transmission

system. Collection system training would include, as appropriate, training in equipment operation, pipe installation and replacement, pipe cleaning, pipe inspection, and reading as-built drawings. Transmission system training would include, as appropriate, training in equipment operation, pump/ejector inspection, pump/ejector maintenance, and pump/ejector repair. CWS's collection system training and transmission system training program shall include:

(A) identification of the related tasks, equipment, and facilities;

(B) description of the technical knowledge necessary to properly conduct the individual tasks and properly operate the individual equipment and facilities;

(C) description of the underlying purposes and technical reasons for conducting the individual tasks or operating the individual equipment and facilities;

(D) standard procedures which personnel shall follow when conducting the individual tasks or operating the individual equipment and facilities;

(E) the content of the initial training, and the frequency and content of the refresher training, to be required for personnel conducting the individual tasks, or operating the individual equipment and facilities; and

(F) training designed to provide trainees with a thorough understanding of the individual procedures, underlying technical reasons, and underlying purposes associated with the individual tasks they may conduct, or the specific equipment and facilities they may operate, and to

provide this in a consistent manner to all trainees.

(iii) Tracking. The Training Program shall include a description of the common data management system to be used for tracking personnel participation in, and completion of, the initial general training, collection system training, and/or transmission system training, and the corresponding refresher training.

(iv) Implementation Schedule. The Training Program shall include an implementation schedule specifying dates and actions related to training activities.

4. Immediately, upon the effective date of this Order, begin conducting a capacity, management, operations and maintenance (cMOM) audit (Audit) of the Friarsgate Subdivision WWCS to include, but not be limited to:

a) financial plans detailing current and planned capital improvement projects in the WWCS and how operation and maintenance of the WWCS will be funded;

b) personnel charts, including job assignments;

c) lift station inspection and maintenance schedules;

d) a sewer inspection and cleaning program;

e) Inflow/Infiltration evaluations;

f) manhole inspections;

g) detailed logs/records of daily operations;

h) easement/right-of-way maintenance programs;

i) easement/right-of-way maintenance;

j) a spare parts inventory; and,

k) any other components necessary for proper operation and maintenance of the WWCS. The Audit shall include a comprehensive review of the WWCS. The review must include a complete technical assessment of the components and operation of the WWCS that are contributing to, or may be contributing to spills of untreated or partially treated domestic sewage. The review must be performed by a licensed South Carolina registered professional engineer.

5. Within ninety (90) days of beginning the Audit review, submit to the Department a report of the Audit findings, a corrective action plan (CAP) and a schedule of implementation to address priority deficiencies identified in the WWCS (pump stations, manholes, line breaks/deterioration, etc.) during the Audit. The CAP shall include a map of the WWCS, indicating the location of corrective actions that have been implemented and corrective actions that are planned based on the Audit, along with details as to how each corrective action item remedies deficiencies within the WWCS. The schedule of implementation shall include specific dates or timeframes for the completion of each action and/or maintenance activity. The CAP's schedule, upon approval by the Department, shall be incorporated into and become an enforceable part of this Order.

6. Within two hundred forty (240) days of the effective date of this Order and based on the findings of the WWCS Audit, finalize a comprehensive management plan (cMOM Plan), covering operations, maintenance and management of the collection system. Submit the cMOM Plan to the Department.

7. Within ninety days (90) days of the effective date of this Order and every ninety (90) days thereafter until this Order is closed, submit to the Department a summary of corrective actions addressing deficiencies in the WWCS. The summary report(s) shall include a map of the WWCS, indicating the location of corrective actions.

8. Within thirty (30) days of the execution date of the Order, pay to the Department a civil penalty in the amount of twelve thousand dollars ($12,000.00).

PURSUANT TO THIS ORDER, communications regarding this Order and its requirements, including civil penalty payments, shall be addressed as follows:

Paul F. Wise
Water Pollution Control Division
South Carolina DHEC
2600 Bull Street
Columbia, S.C. 29201

The order number should be included on all checks remitted as payment of the civil penalty.

IT IS FURTHER ORDERED AND AGREED that failure to comply with any provision of this Order shall be grounds for further enforcement action pursuant to the Pollution Control Act, S.C. Code Ann. § 48-1-330 (2008), to include the assessment of additional civil penalties.

IT IS FURTHER ORDERED AND AGREED that this Consent Order governs only the civil liability to the Department for civil sanctions arising from the matters set forth herein and constitutes the entire agreement between the Department and Carolina Water Service, Inc. with respect to the resolution and settlement of these civil matters. The parties are not relying upon any representations, promises, understandings or agreements except as expressly set forth within this Order.

THE PARTIES UNDERSTAND that the "execution date" of this Order is the date the Order is signed by the Director of Environmental Affairs.

[Signature Page Follows]

FOR THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Myra C. Reece
Director of Environmental Affairs

Date: 7/31/2017

Mark E. Hollis, Interim Chief
Bureau of Water

Date: July 31, 2017

Glenn E. Trofatter, Director
Water Pollution Control Division
Bureau of Water

Date: July 31 2017

Reviewed By:

Attorney
Office of General Counsel

WE CONSENT:

CAROLINA WATER SERVICE, INC.

Bob Gilroy
Vice President of Operations

Date: 7/28/2017

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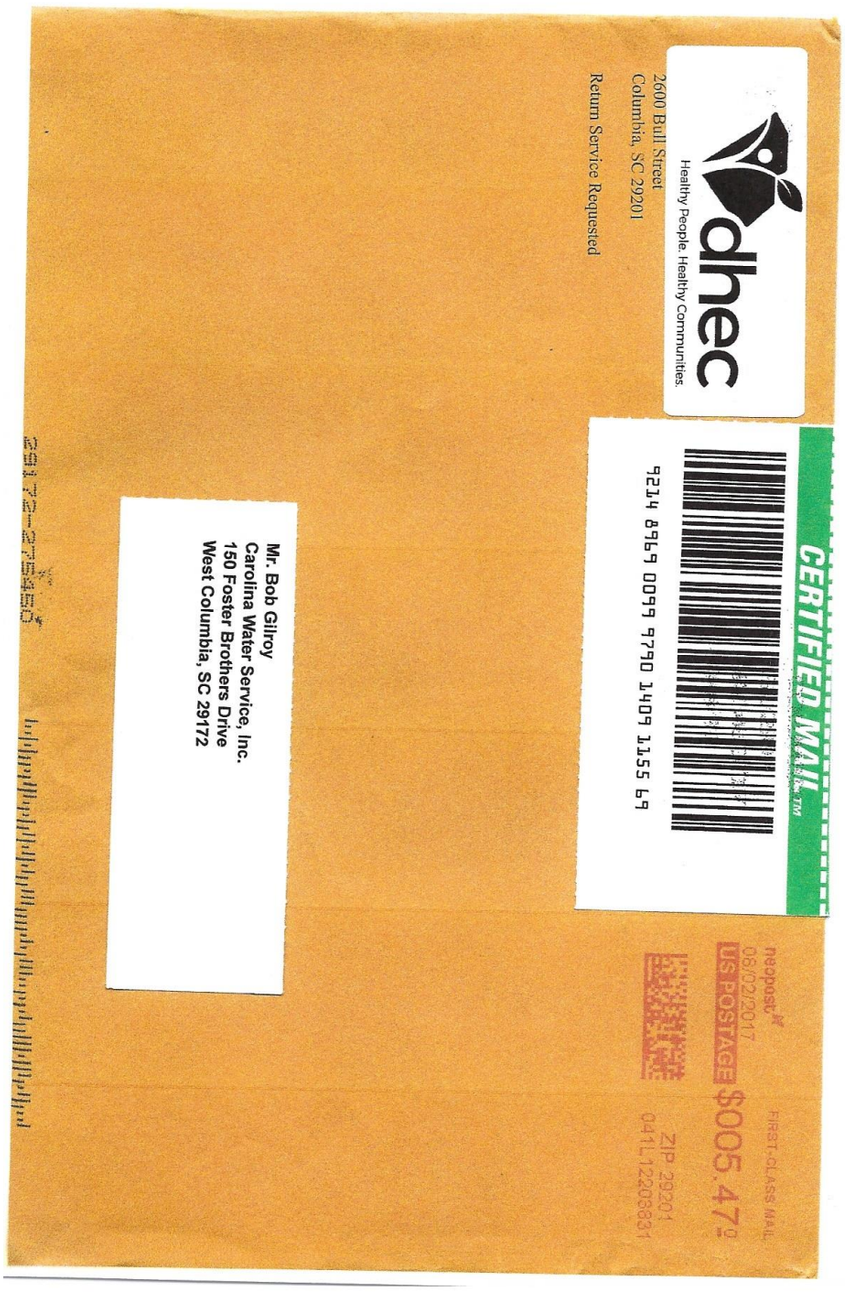

Office of Regulatory Staff
Revenue Attributed to Tax Change Calculation
Carolina Water Service, Inc.
Docket No. 2017-292-WS

from ORS Exhibit MPS-2								
A	B	C	D	E	F	G	H	I
Operating Revenue	ORS Calculated Test Year Revenue	Daily Revenue at 38.25% [1] Composite Tax Rate	Revenue equal to 38.25% Composite Tax Rate	Revenue less Tax	Gross Up for 24.95% [2] Composite Tax Rate	Daily Revenue at 24.95% Composite Tax Rate	Revenue Attributed to Tax Change Per Day	Total Revenue Attributed to Tax Change Collected [3]
		=B/365	=C*.3825	=C-D	=.2495/(1-.2495)*E	=E+F	=C-G	=H*129
Service Territory 1 - Well Water	$840,119	$2,302	$881	$1,421	$472	$1,893	$409	$52,761
Service Territory 1 - Purchased Water	$4,958,863	$13,586	$5,197	$8,389	$2,789	$11,178	$2,408	$310,632
Service Territory 1 - Water - Misc. Revenue	$116,768	$320	$122	$198	$66	$264	$56	$7,224
Total Service Territory 1 Water	**$5,915,750**	**$16,208**	**$6,200**	**$10,008**	**$3,327**	**$13,335**	**$2,873**	**$370,617**
Service Territory 2 - Well Water	$3,447,209	$9,444	$3,612	$5,832	$1,939	$7,771	$1,673	$215,817
Service Territory 2 - Purchased Water	$1,550,886	$4,249	$1,625	$2,624	$872	$3,496	$753	$97,137
Service Territory 2 - Water - Misc. Revenue	$117,867	$323	$124	$199	$66	$265	$58	$7,482
Total Service Territory 2 Water	**$5,115,962**	**$14,016**	**$5,361**	**$8,655**	**$2,877**	**$11,532**	**$2,484**	**$320,436**
Service Territory 1 & 2 - Sewer	$8,941,655	$24,498	$9,370	$15,128	$5,029	$20,157	$4,341	$559,989
Service Territory 1 & 2 - Sewer - Misc. Revenue	$262,560	$719	$275	$444	$148	$592	$127	$16,383
Total Service Revenue Sewer	**$9,204,215**	**$25,217**	**$9,645**	**$15,572**	**$5,177**	**$20,749**	**$4,468**	**$576,372**
Total Water and Sewer Service Revenues	**$20,235,927**	**$55,441**	**$21,206**	**$34,235**	**$11,381**	**$45,616**	**$9,825**	**$1,267,425**

(1) Current composite Tax Rate calculated as follows - R = ST + FT(1-ST) | ST = 5%, FT = 35%
(2) New Composite Tax Rate calculated as follows - R = ST + FT(1-ST) | ST = 5%, FT = 21%
(3) Commission Order expected May 10. 129 days from January 1, 2018-May 10, 2018